INSIDE THE MINDS™

REAL ESTATE LITIGATION STRATEGIES

LEADING LAWYERS ON NAVIGATING THE DISCOVERY PROCESS, BUILDING A CASE, AND RESPONDING TO CURRENT DEVELOPMENTS

ASPATORE

rd Bernstein, Willkie Farr & Gallagher LLP; Craig S. Rutenberg, Manatt Phelps & Phillips LLP
Villiam J. McSherry Jr., Crowell & Moring LLP; Elizabeth A. Sperling, Alston & Bird LLP
Peter Zlotnick, Mintz Levin Cohn Ferris Glovsky & Popeo PC
Lawrence P. Rochefort, Akerman Senterfitt LLP
Todd A. Rowden, Thompson Coburn LLP; David B. Altman

INSIDE THE MINDS

Real Estate Litigation Strategies

Leading Lawyers on Navigating the Discovery Process, Building a Case, and Responding to Current Developments

ASPATORE

Inside the Minds Project Manager, Ryann Burnett; edited by Michaela Falls; proofread by Michelle Levigne

For additional copies or customer service inquiries, please e-mail west.customer.service@thomson.com.

ISBN 978-0-314-28288-0

Mat #41308872

CONTENTS

Richard Bernstein 7
Partner, Litigation Department,
Willkie Farr & Gallagher LLP
SUCCESS IN REAL ESTATE LITIGATION

Craig S. Rutenberg 17
***Partner,* Manatt Phelps & Phillips LLP**
KNOWING THE CLIENT'S CASE: PROACTIVE STRATEGIES TO OVERCOME CHALLENGES IN REAL ESTATE LITIGATION

William J. McSherry Jr. 31
***Partner,* Crowell & Moring LLP**
EFFECTIVE REAL ESTATE LITIGATION STRATEGIES AFTER "FORECLOSUREGATE"

Elizabeth A. Sperling 41
***Partner,* Alston & Bird LLP**
USING EXPERTS AND LITIGATION PLANS TO DEVELOP SUCCESSFUL REAL ESTATE LITIGATION STRATEGIES

Peter Zlotnick 51
***Member,* Mintz Levin Cohn Ferris Glovsky & Popeo PC**
USING MECHANIC'S LIENS TO GAIN LEVERAGE OVER OTHER CREDITORS OF A DISTRESSED REAL ESTATE DEVELOPMENT PROJECT

Lawrence P. Rochefort 63
***Shareholder and Chair, West Palm Beach Litigation Department,* Akerman Senterfitt LLP**
STRATEGIES FOR LENDERS' COUNSEL IN COMMERCIAL FORECLOSURES

Todd A. Rowden, ***Partner and Vice-Chair, Business Litigation Group,*** **Thompson Coburn LLP, and David B. Altman,** ***Attorney at Law*** 85
USE OF RECEIVERS TO SELL FORECLOSURE PROPERTIES

Appendices 95

Praise for *Inside the Minds*

"This series provides a practical and focused discussion of the leading issues in law today." – John V. Biernacki, Partner, Jones Day

"*Inside the Minds* draws from the collective experience of the best professionals. The books are informative from an academic, and, more importantly, practical perspective. I highly recommend them." – Keith M. Aurzada, Partner, Bryan Cave LLP

"Aspatore's *Inside the Minds* series provides practical, cutting edge advice from those with insight into the real world challenges that confront businesses in the global economy." – Michael Bednarek, Partner, Shearman & Sterling LLP

"What to read when you want to be in the know—topical, current, practical, and useful information on areas of the law that everyone is talking about." – Erika L. Morabito, Partner, Patton Boggs LLP

"Some of the best insight around from sources in the know" – Donald R. Kirk, Shareholder, Fowler White Boggs PA

"The *Inside the Minds* series provides a unique window into the strategic thinking of key players in business and law." – John M. Sylvester, Partner, K&L Gates LLP

"Comprehensive analysis and strategies you won't find anywhere else." – Stephen C. Stapleton, Of Counsel, Dykema Gossett PLLC

"The *Inside the Minds* series is a real hands-on, practical resource for cutting edge issues." – Trey Monsour, Partner, Haynes and Boone LLP

"A tremendous resource, amalgamating commentary from leading professionals that is presented in a concise, easy to read format." – Alan H. Aronson, Shareholder, Akerman Senterfitt

"Unique and invaluable opportunity to gain insight into the minds of experienced professionals." – Jura C. Zibas, Partner, Lewis Brisbois Bisgaard & Smith LLP

"A refreshing collection of strategic insights, not dreary commonplaces, from some of the best of the profession." – Roger J. Magnuson, Partner, Dorsey & Whitney LLP

"Provides valuable insights by experienced practitioners into practical and theoretical developments in today's ever-changing legal world." – Elizabeth Gray, Partner, Willkie, Farr & Gallagher LLP

"This series provides invaluable insight into the practical experiences of lawyers in the trenches." – Thomas H. Christopher, Partner, Kilpatrick Stockton LLP

ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.

INSIDE THE MINDS

Real Estate Litigation Strategies

Leading Lawyers on Navigating the Discovery Process, Building a Case, and Responding to Current Developments

ASPATORE

Inside the Minds Project Manager, Ryann Burnett; edited by Michaela Falls; proofread by Michelle Levigne

For additional copies or customer service inquiries, please e-mail west.customer.service@thomson.com.

ISBN 978-0-314-28288-0

Mat #41308872

CONTENTS

Richard Bernstein 7
Partner, Litigation Department,
Willkie Farr & Gallagher LLP
SUCCESS IN REAL ESTATE LITIGATION

Craig S. Rutenberg 17
***Partner,* Manatt Phelps & Phillips LLP**
KNOWING THE CLIENT'S CASE: PROACTIVE STRATEGIES TO OVERCOME CHALLENGES IN REAL ESTATE LITIGATION

William J. McSherry Jr. 31
***Partner,* Crowell & Moring LLP**
EFFECTIVE REAL ESTATE LITIGATION STRATEGIES AFTER "FORECLOSUREGATE"

Elizabeth A. Sperling 41
***Partner,* Alston & Bird LLP**
USING EXPERTS AND LITIGATION PLANS TO DEVELOP SUCCESSFUL REAL ESTATE LITIGATION STRATEGIES

Peter Zlotnick 51
***Member,* Mintz Levin Cohn Ferris Glovsky & Popeo PC**
USING MECHANIC'S LIENS TO GAIN LEVERAGE OVER OTHER CREDITORS OF A DISTRESSED REAL ESTATE DEVELOPMENT PROJECT

Lawrence P. Rochefort 63
***Shareholder and Chair, West Palm Beach Litigation Department,* Akerman Senterfitt LLP**
STRATEGIES FOR LENDERS' COUNSEL IN COMMERCIAL FORECLOSURES

Todd A. Rowden, *Partner and Vice-Chair, Business Litigation Group,* Thompson Coburn LLP, and David B. Altman, *Attorney at Law* 85
USE OF RECEIVERS TO SELL FORECLOSURE PROPERTIES

Appendices 95

Success in Real Estate Litigation

Richard Bernstein
Partner, Litigation Department
Willkie Farr & Gallagher LLP

ASPATORE

Introduction

As in other forms of civil litigation, a good real estate litigator must bring knowledge, judgment, and credibility to each case. Because litigation is almost always about persuading a person, whether a judge or the opposing party, or a group of people in the form of a jury, the key to being persuasive and successful in real estate litigation is using common sense.

Knowledge

An effective real estate litigator must be a master of the facts. No amount of legal research can equal the benefits of the hard work necessary to locate important documents, e-mails, and witnesses. An attorney can craft a sound strategy only when knowledgeable about all the facts, including those that present opportunities for increasing and reducing damages. When litigating a real estate case, thorough discovery of the facts in the possession of a sophisticated opponent, such as a major developer, is extremely beneficial. A major developer's internal discussions of a piece of real estate often contain admissions that, when placed in the proper context, are crucial to the case. An example of this is a client whose right of first offer (ROFO) on a parcel of land was violated when the land was sold to a different company. A document from the defendants stating that the land in question was "irreplaceable" or "unique" could be invaluable to persuading a judge to grant specific performance because money damages are insufficient. Another example is a case where a corporate merger triggers the client's ROFO on the land. Documents showing that the sellers put no value on the acquired company, apart from the sum of its real estate assets, can help demonstrate that the sale was essentially a sale of a bundle of real estate, which triggered the ROFO.

Knowledge of the law is an equally important contributor to a real estate attorney's fluency of the relevant facts. Because appellate guidance is often lacking, trial judges deciding novel real estate law issues may assign heightened weight to other trial courts' decisions. For example, I litigated a case concerning the interpretation of a ROFO against a large corporate defendant in which the defendant had recently settled another case in a different trial court—but not until after the court had denied, in an unpublished opinion, the defendant's motion for summary judgment

concerning a similar ROFO provision. Order, *KSI Services, Inc. v. H Street Building Corp.*, No. 05-6033 (D.C. Super. Jan. 9, 2007). This unpublished opinion was helpful in persuading the judge in our case that the legal effect of our ROFO was far from settled, and the judge should therefore deny the defendant's motions to dismiss and for judgment as a matter of law. Two unreported decisions by the Delaware Chancery Court and an unreported bankruptcy court decision were also helpful in the case. *Tenneco Auto., Inc. v. El Paso Corp.*, Civ. A. No. 18810-NC, 2002 WL 453930 (Del. Ch. Mar. 20, 2002); *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, Civ. A. No. 12507, 1993 WL 294847 (Del. Ch. Aug. 2, 1993), *aff'd*, 647 A.2d 382 (Del. 1994). As in any other civil litigation context, these unreported decisions were persuasive when no reported authority squarely addressed the issues.

Additionally, real estate attorneys will find it beneficial to learn about the judge and opponent in each case. Reading a judge's opinions and talking to lawyers who have appeared before the judge can be extremely helpful. Some judges, for example, may routinely deny motions to dismiss even though they often grant summary judgment motions, even ones filed early in the case. Other judges may have a reputation for not reading lengthy briefs, but for intently participating in oral argument. Similarly, an attorney can learn much about an opponent from colleagues and the client. Real estate litigation, just as all litigation, relies on networking and learning about people.

Judgment

Knowledge is not enough to make a real estate litigator successful; the litigator needs to know how to use it, which requires judgment and experience. Judgment allows a real estate litigator to decide which issues to press and when it is appropriate to do so. With experience, a litigator will know the importance of finding a common-sense reason why the judge or jury would find in the client's favor. This extends beyond having a technical argument divorced from basic notions of fairness and justice. Judges and jurors almost invariably need to be able to tell a non-lawyer spouse or friend, in a few sentences, why they made their decisions.

The first big decision for a real estate litigator when defending a case is usually whether to file a motion to dismiss, and if so, on which issues. This is critical for a number of reasons. As one of my mentors, Bob McLean,

told me, "You never want to lose your first motion." The first motion is often when the judge forms impressions about the case and the lawyers, and because many real estate contracts waive juries, a judge is often the ultimate trier of fact. This is why an attorney needs to be able to choose the right issues and argue key themes at all times. A real estate litigator needs to use judgment concerning which arguments and evidence are genuinely persuasive, and whittle away the rest. When a judge reads an argument that is weak and contradicts common sense, even if it is short and at the end of a brief, it is similar to listening to a clock chime thirteen times—the last sound undermines everything that went before it.

Credibility

Judges and jurors often say they will never know as much about a case as the lawyers do, and that makes sense. The lawyers spend much more time on each case and have many more resources and colleagues to assist them. Instead, judges and jurors justifiably pride themselves on their ability to assess credibility. This includes two things: recognizing if the lawyer believes what he or she is saying, and assessing whether the lawyer is advocating something reasonable and fair as a matter of common sense. This is what everyone looks for in their daily lives when interacting with people; judges and juries are no different.

My father was a civil litigator for fifty years, mostly as a sole practitioner or in a small firm, often on the plaintiff's side. He taught me the importance of being the lawyer the judge or jury trusts the most in the courtroom. While it does not mean your side will win every point, it maximizes your chances. Building that kind of trust requires candor and reasonableness. A good real estate litigator will give the judge or jury the best explanation of a troublesome fact rather than ignoring it. Every time an attorney files a brief or stands up in court, the attorney's credibility, as well as the client's, is on the line.

Because litigation is a form of communication, litigators should not merely present their arguments in terms of what would convince them, their colleagues in the real estate bar, or a hypothetical audience. It is crucial to consider what is important to the case's particular judge or jury. I have argued in the US Supreme Court and many appellate and trial courts. Even if the issue is the same, the briefs attorneys file with different courts should address the different perspectives, interests, and practices of each particular court.

Alternative Dispute Resolution

When litigating a real estate lawsuit, the attorney is a problem solver. A defendant faces at least six potential costs: attorneys' fees, expert fees, other out-of-pocket costs, injury to reputation, distraction of employees, and plaintiffs seeking a large judgment. The best solution is complete victory on motion, at trial, or on appeal, but many real estate lawsuits do not end in complete victory or complete defeat. Most cases settle, with the defendant paying a reasonable price to deflect those six costs. Because settlement plays such a large role in real estate litigation, it is important for real estate litigators to understand every significant motion changes the balance in a real estate case and thus presents two opportunities for settlement, one before it is decided, to reduce risk for both sides, and one after it is decided. In my experience, in big cases, early settlements save a defendant money more often than they cost money.

Mediators can be useful in settling real estate cases, especially when they are court-appointed and can consult with the court, but mediators are rarely miracle workers. A real estate litigator needs to find an argument that can persuade an opponent to settle for a reasonable price. If an attorney can convince a mediator that the client has a strong argument, and the opponent trusts the mediator, the attorney has a good chance of obtaining a reasonable settlement.

Most settlements result from persuasion, not capitulation. An opponent is more likely to be persuaded that the client could win if the opponent thinks of the attorney as a good lawyer rather than a sworn enemy. Sometimes litigation can result in harsh exchanges between opposing counsel, and I have had to be tough, and sometimes confrontational, with certain opponents; however, with rare exceptions, lines of communication reopened, to the benefit of my clients. If an attorney cannot talk to the opponent, the client may miss the opportunity for a reasonable settlement. Reaching a successful settlement also depends on the attorney's willingness to reject an unreasonable one. An attorney must be ready and willing to try the case, and the opponent must believe that without a doubt.

Trials

Every trial is different. When you go to trial, these four points should help:

1. Clear, demonstrative evidence, including simple graphs and timelines, can be effective. Similarly, it is better to have an expert who speaks in plain English than a Nobel Prize winner who is a poor communicator. Jargon is not persuasive, even when delivered by a lawyer or a witness, because people are persuaded only by arguments they understand.
2. Don't over-try cases. Although you must satisfy your burden of proof on your affirmative claims or affirmative defenses, you should consider what really matters to the judge and the jury as a real person. Emphasize what is persuasive, and do not be repetitive on small points.
3. Don't push fact witnesses into becoming advocates. Witness answers should be simple, straightforward, and comfortable. You should not push your witnesses to remember more than they actually remember. Gilding the lily can backfire. The demeanor of a witness should be the same on cross-examination as it was on direct. Anything else hurts credibility.
4. Don't push expert witnesses into becoming lawyers. Experts should adhere closely to the bounds of their expertise. They should not advocate arguments that do not call on their expertise. Judges tend to dislike that.

Common Strategies for Real Estate Litigation

Parties facing real estate litigation must, at a minimum, analyze the entire contract, consider if specific performance is the best remedy, find a witness who can explain the key contract provisions, determine how the jurisdiction treats parol and extrinsic evidence, and thoroughly review the opponent's public statements.

Analyzing the Contract

When analyzing a real estate contract, an attorney must remember basic tenets of contract interpretation, including the fact that different words mean different things, the same words mean the same thing, and courts avoid interpretations that render other provisions in the same contract contradictory, meaningless, or superfluous. It pays to consider whether all of the provisions of the real estate contract—including provisions not