

Getting To Verdict: Being Cost Effective And Winning The Essential Role Of The Trial Swat Team

**John E. Osborn
and Kieran P. Holohan**

**JOHN E. OSBORN, P.C.
AND GONZALEZ OBERLANDER
& HOLOHAN, LLP**

When it comes down to it, litigation of major commercial cases has become about avoiding trial, not about trying cases. However, in the protracted and expensive discovery and settlement process sometimes it is more beneficial and even cheaper to simply try the case. Most commercial litigators do not have a grounding in trying cases and many seasoned litigation lawyers have never tried a case to conclusion.

According to Kieran Holohan, "After discussing this with in-house counsel and with clients, we recognized the need for lawyers who are experienced, skilled and comfortable in the courtroom. That is how Jack Osborn, who heads the boutique construction law firm, John E. Osborn, P.C. and myself, together with my law partners in Gonzalez Oberlander & Holohan LLP, Andrew Gonzalez and Bert Oberlander, decided to get together to set up a SWAT team with a specific focus to try cases through to verdict."

"What I have seen is that lawyers, who have an established trial track record, are able to achieve excellent settlements at early stages. It is an instinct thing," Osborn observed. "As soon as litigation is commenced, you can tell which lawyers dread trial and those who welcome it. Our group is skilled in connecting with people, and convincing jurors, while, at the same time, having technical expertise regarding admissibility of evidence, expert testimony and jury charges."

"It is not a mystery why each of the Gonzalez Oberlander & Holohan partners are at home in the courtroom," Bert Oberlander pointed out. "each of the partners in our firm served as an assistant district attorney in Staten Island, the Bronx and Brooklyn, respectively, and, among us, we have tried over 150 cases to verdict. We simply have no fear of taking our case to the jury; we always connect with the jurors. We have a passion for trial work, our clients and for winning."

"It is easy to see that each of us has a different trial style. Kieran and I are, by nature, outgoing and gregarious while Bert is more understated," according to Gonzalez, "but with his Midwestern looks and calm demeanor,

John E. Osborn is a Partner of the New York City and Westchester construction litigation and environmental law firm of John E. Osborn, P.C. Kieran P. Holohan is a Partner of the New York City litigation firm of Gonzalez, Oberlander Holohan LLP.



John E. Osborn

I can see why jurors and the court respond so favorably to Bert's credibility; he always gets people on his side."

According to Osborn, "what makes the SWAT team unique is that even though our focus is on complex commercial or construction litigation, our approach is to bypass the hardball litigator by taking the case directly to the jury. We understand juries and we talk their language."

"The focus of our client base is on the in-house counsel," Holohan observes. "In-house counsel is most often in the best position to understand the intersection between fact and law and, with outside litigation counsel's help, to develop an informed settlement analysis. We tell in-house counsel that we would like to talk to them before there is a lawsuit so that we can help solve the problem before a lawsuit occurs. Knowing the trial value at the outset allows the client to set an appropriate strategy. In-house counsel knows that sometimes a trial cannot be avoided and, in order to avoid simply 'caving in' to opposing counsel's demands, outside counsel must be able to take the case to trial, cost effectively and expeditiously. This having been said, a strong part of our client base also happens to be the commercial litigator who simply does not want to endure the disruption and anxiety of serving as lead trial counsel."

Gonzalez points out another critical ingredient: "Part of being successful as a trial lawyer is the ability to 'speak to' the jury, but it is equally important to establish excellent communication with court personnel, including the judge, clerk and court officers. Failure to develop a great rapport with them can often result in negative treatment which can manifest itself in front of a jury."

"It is really like football – when you see the opening you must go for it," observes Osborn. "Having a photographic memory and a facility for retaining complex information is a definite plus. Kieran, for example, has a



Kieran P. Holohan

remarkable ability to remember the content of documents and testimony. This is a huge advantage on cross examination, making effective objections to evidence and especially in crafting the summation."

According to John E. Osborn, P.C. attorney Jason Snell, "To win at trial, the trial lawyer needs to be a combination of a down-home character like Andy Griffith and a polished anchor like Tom Brokaw. He needs to be able to prepare witnesses based on an intuitive understanding of how witnesses will behave in the witness box."

"The ability to master the finer points of making an effective presentation is a necessity. The seamless use of charts, graphs, computer models, pictures, video clips and other choreography is expected," states Osborn, "but it can neither be awkwardly presented nor be too slick."

Forming A SWAT Team For Trial

In addition to a well established trial track record, the SWAT team has significant experience in addressing the complexities of a trial, which include jury charges, admissibility of exhibits and testimony, expert witness preparation, motions *in limine*, pre-trial motions, motions for judgment notwithstanding the verdict, trial memorandum, CPLR knowledge, jury selection, notices to admit and pre-trial orders.

When To Hire The SWAT Team

Ideally, the SWAT team is brought on before the litigation has begun. The reality is that, often, the SWAT team is brought on as the case is marked ready for trial. Taking over at the trial stage is a challenge as the pleadings, depositions, document discovery, choosing of expert witnesses, interviewing of non-party witnesses, fact investigation, site visits and prior dealings with the court will have been undertaken by prior counsel. Because client relationships are coveted, the SWAT team members have developed the ability to keep the client's existing counsel in the picture

and to tap them as a trial resource even though they will not be lead trial counsel. With this in mind, there are benefits in continuity and institutional memory to having the client's original counsel continue as a part of the trial team.

But waiting to bring the SWAT team on until the "trial ready" stage is not preferable. It is extremely expensive to analyze and develop a trial strategy under time constraints without having been involved from the outset. Even though it is undesirable, taking over at the "trial ready" stage is not impossible.

Oberlander observes, "There may even be an advantage to have trial counsel take over late in the game, at the trial stage, as it provides a fresh perspective and the ability to see the overall picture."

The SWAT Team In Mediation And Arbitration

"There is no doubt that the skill and savvy which facilitates a win in court, wins the day in mediation and arbitration. Just as one's personality, character and integrity is revealed in trying a case to a jury. Arbitrations have become simply a less formal version of a bench trial as so many technical motions and an expanding discovery process have infused," says Osborn. "I am an enthusiastic proponent of mediation and I make sure that I prepare for mediation in much the same way I would for a jury trial. Being 'trial ready' at mediation has an impressive impact on how the opposing counsel and client, the mediator, and even your own client, view the case."

As Holohan observes, "I like talking to arbitrators and mediators the same way I like to talk to jurors. In the construction case, it is all about teaching how the building was built, educating and communicating, and not about complex and inaccessible issues which do not hold anyone's interest. Just like the passerby to a construction site who is excited to peer through the hole in the fence to see the construction project secretly rising, the juror, court, arbitrator or mediator, develops a bond with you when you help them see that picture."

Conclusion

It is not a surprise that the SWAT team members each connect easily with people, nor is it a surprise that each of them began their careers fighting for the public interest, Gonzalez, Oberlander and Holohan as assistant district attorneys, John E. Osborn, P.C. attorney Snell in a Texas law firm representing school districts, and Osborn as Deputy General Counsel to the New York City Comptroller. In fact, this public interest advocacy has continued on as the SWAT team client base prominently features the representation of not for profits and school districts.

Please email the authors at josborn@osbornlaw.com and holohan@gohllp.com with questions about this article.