

Fundamental Strategic Considerations in Business Litigation

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When a new lawsuit comes in, in-house and outside counsel will often cycle through a checklist that goes something like this:

- ✓ Identify key persons involved within organization
- ✓ Implement “litigation hold” for discovery
- ✓ Notify insurance carrier
- ✓ Make sure litigation counsel is appointed
- ✓ Designate internal “point person” to work with counsel
- ✓ Require counsel to prepare a budget and periodic reports
- ✓ Calendar date for responsive pleadings
- ✓ Calendar date for completion of discovery
- ✓ Calendar date for submission of dispositive motions

Check the last item on the list and you are done, at least until it is time for the next quarterly report, right? Wrong.

What’s missing is the early development of a strategy for the litigation. Developing a strategy entails more than going through the standard steps. Litigation strategy involves reviewing the dispute in the larger context of the business, including considering the potential impact of the dispute—or possible resolutions of the dispute—beyond the scope of the immediate case.

Although the need for a strategic litigation plan seems obvious, my experience is that it is often overlooked.

This may be for any number of reasons:

- The case may be a one-off undertaking for litigation counsel, who thus lacks the necessary background to provide strategic advice
- In-house counsel may lack the tenure and background needed to understand how the litigation may affect broader concerns
- Counsel (in-house and outside) may be so busy that they go from one fire to the next, without pausing to consider the bigger picture

- Some counsel have a “cook book” such as the checklist to the left that puts blinders on larger concerns
- Sometimes outside counsel will see the train wreck coming and sound the warning, but the client just will not listen

If strategic considerations are overlooked, however, a small case may turn into a medium-sized headache and a medium-sized case may turn into a full-blown crisis. Although it is impossible to prevent every such issue, incorporating an early strategy session and continuing strategic reassessment into litigation management will almost always help lead to a better outcome. This white paper will focus on some of the key issues to developing a successful litigation strategy.

First Question: Is this case unique or does it involve issues that are likely to occur again?

A key strategic consideration is whether the case is likely to have issues that may occur again. Here are some cases that may involve recurring issues:

- Interpretation of language in form contracts, warranties, insurance policies or other documents
- Failure of a product component (particularly if unexplained) leading to a claim
- An alleged failure to warn relating to a type of injury that may happen again
- Alleged failure to comply with governmental requirements in connection with a routine (and recurring) type of transaction

Identifying issues that are likely to recur can have a fundamental impact on how cases are approached. For example, if a plaintiff’s claim is based on a strained interpretation of a form contract, the calculation may be to litigate the case to conclusion and win. On the other hand, if there are no other such claims on the horizon, and if one is in a risky jurisdiction or court, it might counsel in favor of a quick and confidential settlement based on the cost of defense.

If a case involves the interpretation of a form contract, warranty or other document that is plausible and that may affect thousands of customers, then different considerations come into play, particularly if the plaintiff's bar is lining up with other cases. The approach taken in such circumstances can run the gamut from a decision to fight every case to the bitter end (hopefully discouraging other plaintiffs from filing) to negotiating a class-action settlement in order to minimize the costs involved in litigating thousands of cases. The path taken will depend on many factors, including the estimated costs of defending individual cases, to management's proclivity to settle, to available insurance coverage.

Cases involving potential failure to comply with government regulations present special challenges, including the daunting prospect of civil or criminal litigation with the federal or state governments or regulatory agencies. In such instances, it is critical to get expert input on multiple fronts, which will likely extend far beyond the scope of the civil litigation. It is also important to assess, if possible, how positions taken in the civil litigation may later affect regulatory or other issues.

Second Question: What Effect Is the Pendency of this Case Going to Have on the Company Beyond the Cost of Litigation?

When companies become involved in litigation, they almost reflexively focus on the cost of attorney's fees and related expenses. There is often an even higher cost that is overlooked: The intrinsic costs on the company of dealing with the litigation. These costs include time spent by executives or key personnel in working with counsel, responding to discovery requests, and sitting in depositions or trial instead of focusing on executing the company's business plan or other productive endeavors. Particularly in smaller companies, litigation can take a substantial mental toll in the form of distraction and worry by key executives.

Intrinsic costs are of course incurred in every case, and such costs are not a reason to settle every case early on or for too much money. The intrinsic costs should, however, be considered from the outset, and, as noted, they are often not considered at all. One key inquiry is whether the CEO or other key management personnel were involved in the underlying transaction or even simply "kept in the loop," perhaps being copied on emails. If so, the executive is likely to end up on the deposition list, a fact that will probably cause at least two to three days of distraction and disruption.

Third Question: Are There Any Unusual Problems?

Some cases have unique problems that should be factored in at the outset. For example, a key employee in the underlying transaction may have left the company. In a worst-case scenario, the employee may have been fired for reasons having to do with the transaction.

Even having left for other reasons on positive terms, a former employee is not likely to want to devote substantial time or energy to assisting with the case. If the employee has moved across the country or to another country, he or she may not be available to testify at trial. In considering this issue, remember that deposition testimony is almost never a good substitute at trial.

Similarly, key documents may not be available, or, even worse, may have been destroyed. At the very least, lost documents present problems of proof. In some instances, lost documents may give rise to claims of spoliation, which may result in the court allowing the jury to draw an adverse inference or imposing other sanctions.

If the employees and documents are available, another assessment that needs to be made as early as possible is the relative strength of each side's witnesses. Some very good people freeze up when they are asked to testify under oath. Others are just not articulate. Sometimes executives can come across as arrogant and lacking compassion.

These problems often cannot be identified until deposition preparation, but it should be done as early in the process as possible. If a key person looks to be a terrible witness, however, it may well be better to settle before the depositions begin.

Note that most of the special problems revolve around the fundamental questions of proof: Who is going to testify? What documents will we use? Is our evidence likely to be admissible? Assuming we get our evidence in, will it be persuasive to a neutral person with no prior knowledge of the facts or about the details of your business? It is surprising how little consideration is often given to these key issues, particularly early in the litigation process.

Fourth Question: What Are Our Three Key Themes for Trial?

The best way to assess a case, to settle a case, and to be ready if the case does not settle is to prepare for trial. Despite this reality, very few lawyers do it. One of the most important parts of preparing for trial is to develop two or three key themes that frame the facts from your point of view.

It is often relatively easy to identify the likely themes early on, although they may need to be refined (or even changed) as investigation and discovery proceeds. It is also useful to try to imagine the other party's key themes. The development of each party's anticipated key themes and the cold and candid assessment of whether they are persuasive can often provide a powerful tool to evaluate a case and to consider strategic options.

In most instances, simply going through the exercise will put you miles ahead of the opposition. In past years, I monitored major litigation for a large insurance carrier, including cases with extremely large exposures defended by some of the best-known law firms in the country. We would receive periodic briefings from defense counsel, which inevitably included a masterful recitation of the minute factual details of the case.

During these briefings, I would often ask: "What are your three key themes for trial?" The almost inevitable answer would be a further regurgitation of the factual details, or, in other instances, a statement that they "would be working on that later" with a jury consultant. Neither answer inspired a great deal of confidence.

The purpose here is not to criticize, but simply to illustrate how even really good and really expensive lawyers from blue chip law firms tend to ignore developing themes, at least until the last possible minute. This is unfortunate, because having key themes not only aids in case evaluation, it also helps in discovery, witness preparation, settlement negotiations, and just about every other aspect of case preparation. And in the relatively rare instances when you have to try the case, you will be prepared.

Fifth and Very Important Question: What Would a Win Look Like?

One of the most important questions in thinking strategically about litigation is "what would a win look like?" A realistic answer to this question is probably not: "To have the court throw out their case on a motion to dismiss, to order them to pay our attorney's fees and to impose sanctions." A realistic answer is often not easy, and should take into account the factors discussed above, the particular facts of the case, and the predilections of the particular jurisdiction or even the particular judge.

In arriving at an answer, a key consideration is whether settlement at any point is a realistic option. Although a huge majority of cases settle, there are a few cases in which settlement is simply not an option. In such rare cases, a win could be prevailing on a motion for summary judgment. If such a result appears feasible, then a win can be defined as obtaining summary judgment after discovery. Once this is determined, counsel can focus their efforts on achieving this goal.

If settlement is an option, then a question that should always be asked is whether there is a “win/win” alternative. “Win/win” alternatives provide each party with a benefit instead of one party simply paying the other party for a release. For example, if a lawsuit involves a claim between parties with a long-term business relationship, each party may have an interest in saving the business relationship notwithstanding the current dispute. For example, possible “win/win” alternatives in a dispute between a customer and an equipment supplier might include the supplier providing product discounts for future orders, providing a discount on an extended service contract, or providing an extended warranty, all options that may maintain the relationship.

“Win/win” alternatives often present themselves in intellectual property litigation, including the possible cross-licensing of IP, which might increase sales for both parties. Class actions are often resolved by “coupon settlements,” which provide class members with a discount on future products or services. Although coupon settlements are sometimes validly criticized as simply a means to funnel an attorney’s fee award to class counsel, they may provide a preferable alternative to litigation, and may maintain long term relationships with customers.

If a “win/win” alternative is not possible and a settlement will involve the payment of money by one side, then a win can be defined as achieving a settlement within a particular range. Although litigants almost invariably go through this exercise in preparing for mediation, many do not do it as part of their initial case assessment and strategy. Outside counsel often hear clients say that they are unprepared to do so, that they need discovery, or that they need to see how things “play out,” etc. In my experience, these are often just excuses to procrastinate.

In most instances there is enough information to establish a reasonable settlement range early in the case, and failing to do so is a mistake. If settlement at some price can be a win, then getting an early settlement and minimizing legal fees should normally be in the playbook.

A colleague once remarked that cases are rarely like a fine wine; in other words, they seldom get better with age. Every experienced defense attorney can point to multiple instances where a client’s reluctance to pursue an early settlement has resulted in the price increasing, possibly in the face of negative developments in discovery, as the trial date drew near. Similarly, every experienced plaintiff’s attorney can probably point to multiple instances where the settlement value of a case evaporated in the face of a bad deposition or a negative court ruling.

Of course, it takes two parties to agree to a settlement, and early settlements may be thwarted by recalcitrance from the other side. However, if settlement at a certain level can be reasonably defined as a win, the possibility that the other side might not agree (which is always a possibility) should not be a deterrent to seeking an early resolution.

If efforts to achieve an early resolution are unsuccessful, the next step is to reassess. In some instances, it will be clear that any settlement will be impossible. In other cases, it may be possible to revisit settlement later in the process. Maintaining the focus on developing themes for trial and a discovery plan to support those themes will keep you prepared for any eventuality.

Taking Action: Incorporating Strategic Thinking into Litigation.

There are many proactive steps that can be taken to incorporate strategic thinking into litigation. The main step, however, is to make sure that strategy is taken into account from the beginning. Here are a few more specific suggestions:

- **Ask for a strategic assessment from counsel at the outset.** As outside counsel, we are frequently asked for litigation budgets. Although most of us somewhat reluctantly understand the need, budgets can turn the focus exclusively to the cost of prosecuting the case or undertaking the defense and can even create an antagonistic relationship between the client and counsel. The answer is not to dispense with budgets, but also to ask for a strategic assessment that includes asking for anticipated themes for trial and suggestions for a possible early resolution. A strategic assessment can and should be a creative and collaborative effort between counsel and the client, and, in addition to the value in managing the case, will help foster a positive relationship.
- **Have an early internal meeting.** Have an early internal meeting involving key business people and outside counsel. Make sure that the impact of the litigation on executives and other key personnel is discussed. Identify any problems, such as key witnesses who are no longer employed and possible missing documents. Make sure that outside counsel—who may have no prior experience with the company—understand how the business works and the potential effect of the litigation on the business. Discuss whether a “win/win” settlement is possible. Develop a strategic assessment at the meeting, or ask for an assessment (or update to a prior assessment) from counsel after the meeting.
- **Involve someone out of the fray.** Even business litigation can get personal. Executives involved in a dispute may be focused solely on winning or even punishing the other side. Counsel can also become personally invested, sometimes because of the actions of opposing counsel. In addition, persons involved in handling the immediate dispute may lack the overall knowledge of the business to assess the potential broader effects. It is thus often helpful to involve someone “out of the fray” in assessing the strategic implications. This person may be a more

senior in-house attorney or executive. In some large cases, clients will engage separate outside counsel to develop strategies for winning the case or for settlement. The involvement of someone not involved in the day to day combat of litigation can often lead to a more effective approach for resolution.

- **Reassess and refine.** Although incorporating strategic thinking from the beginning is important, in most cases it will be necessary to continually reassess and refine the strategic decisions until the case is resolved. This can be accomplished by incorporating strategic thinking into periodic meetings and reporting.

Conclusion

Despite the critical importance of strategic considerations in litigation management, it is overlooked in a surprising number of cases. Keeping strategic considerations at the forefront will result in a better plan with the potential for lower litigation costs, fewer internal disruptions, and the potential for an early resolution, possibly on a “win/win” basis. If resolution is not possible, strategic preparation will make sure your company is ready to go to trial.

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