

***Managing Corporate Litigation:  
It's About Good Judgment***

Studies show that litigation fees typically account for about seventy-five percent of what law departments spend on law firms. Every company wants to control and reduce litigation costs. However, achieving the goal tends to be elusive for companies, large and small. Various tools and techniques are offered as means to control costs. These include budgeting, early case evaluations, unbundling services, the use of ADR and competitive bidding for the work.\* These tools can certainly have value. However, they are only tools, and, like all tools, if they are not employed with skill they may not work well.

For example, a litigation budget provides a cost estimate and may flag waste that can be eliminated to reduce costs. However, if the budget does not focus on the order in which steps are to be taken in order to maximize the potential for achieving an acceptable settlement when first reasonably possible, the budget may not help guide the case to early resolution. The assumption may be that as long as the budget was not exceeded, the case was handled efficiently. However, if the case strategy and handling was not designed to minimize costs before settlement, merely staying under budget simply masks inefficiencies. Likewise, a litigation plan may appear legally sound and logical. However, if the plan does not reflect what other strategies are available and the basis for the decision to follow a given course, the plan may not reflect a thorough analysis of the options.

Ultimately, the critical requirement for handling litigation effectively and efficiently is “good judgment.” The term “good judgment” is used here to mean acting in a manner that focuses on enhancing the probability that a satisfactory resolution, by either settlement or trial, can reasonably be expected to be achieved as promptly and at as low a cost as possible.

If the exercise of good judgment is critical for the effective and efficient handling of litigation, then good litigation management must focus on assessing and encouraging good judgment. Tools, such as budgets and case plans, must be used as means of promoting and tracking the exercise of good judgment. This paper will provide an overview of how judgment focused litigation management can be implemented.

*Defining Satisfactory Resolution*

The first job of the litigation manager is to understand the true goals of the litigation. The goals in business litigation can be complex. There may be business relationships involved that need to be preserved despite the litigation. The goal may be to dissuade the filing of similar suits, or the objective may be simply to recover or defend a claim for damages.

The process of defining the goals of the litigation begins with getting input from the appropriate business and management personnel. These are the individuals who will provide the essential business objectives at stake in the litigation.

While the business objectives are central to setting the goals of the litigation, the business objectives need to be melded with legal considerations in defining the satisfactory resolution. The business objective may simply not be legally obtainable. For example, management may want to vigorously enforce a covenant not-to-compete in the contract of a departed executive, but recent case law may make portions of the covenant unenforceable.

Even before outside counsel is asked to provide a litigation budget, the likely litigation costs should be estimated internally and weighed against the pure business goals in defining the satisfactory outcome for the litigation. The business client may initially express a desire to litigate to the end, regardless of cost, but that position may not be factoring in a reasonable estimate of the cost of litigation. When costs are factored into the equation, the business objective may moderate.

When legal and cost considerations are factored into the business goals, the result should be a definition of a satisfactory resolution to the litigation. The acceptable resolution should be defined as a range of outcomes. For example, a company that feels that it has been damaged may, naturally, want to recover all of its losses. However, complete victories are not the rule in litigation and settlements by definition involve compromise, so the satisfactory resolution might be defined as recovering 50% to 70% of the calculated loss.

Since setting the initial definition of a satisfactory resolution is done without the benefit of discovery and, in many cases, without a comprehensive legal analysis, it should be recognized that the range of satisfactory outcomes may change. However, it is important that the company start with its own

reasoned preliminary definition of a satisfactory resolution at the outset of the litigation. This will give a benchmark for setting a plan and budget, as well as for analyzing changes to the definition of an acceptable outcome.

The definition of a satisfactory outcome may not necessarily be communicated to outside counsel with the initial retention. The company may prefer to receive the analysis of outside counsel and their initial recommendation of what would constitute a satisfactory range of outcomes. Certainly, outside counsel needs to be informed of the business goals and issues so they have that information in developing their recommendations. However, the company may want to get the independent cost-benefit and legal analysis of counsel that is not swayed by the company's own preliminary internal analysis. Alternatively, the company may want outside counsel to accept the company's definition of a range of satisfactory outcomes and proceed accordingly with the litigation.

In either case, it is important that at the outset the company and outside counsel agree on the preliminary definition of satisfactory resolution, probably defined as a range. The process of managing the litigation then involves encouraging counsel to achieve that satisfactory outcome as efficiently and at as low a cost as reasonably possible.

#### *The Objective of Judgment Based Litigation Management*

The objective of judgment based litigation management is not to substitute or second guess the judgment of litigation counsel. Rather, the objective is to focus on and encourage the application of good judgment, as the term is used here by counsel, across all aspects of the litigation.

A company should not simply assume that its litigation counsel will apply good judgment in all aspects of the litigation process. This does not imply that the lawyer is negligent or incompetent. Rather, there are many pressures and demands in litigation that may result in a decision not best suited to achieving a satisfactory result as promptly and at as low a cost as reasonably possible.

Litigation is an adversarial process and the battle and desire to win can skew judgment. At the outset of litigation, clients often convey, because of emotion, a desire to be tough and not yield on any issue in the litigation. When the client says, "I don't want to pay those scoundrels a nickel," litigation

counsel may take the words as marching orders and design a scorched earth strategy. However, what the client really means, most often, is that he or she is upset, doesn't like the idea of paying anything, but wants the case to go away. This is why it is important that the business goals be vetted in the context of litigation costs and a definition of a satisfactory resolution be communicated to outside counsel. Counsel will not be in a position to exercise good judgment, as defined here, if there are mixed messages, or no message, as to what the realistic objectives are.

Law firms pressure partners to generate revenue and associates to bill hours. Such pressures, coupled with the desire to win the adversarial litigation arena, can cause lawyers to over litigate a case. The fear of missing something can also drive litigation counsel to excesses. Again, communication of expectations is critical. The client must convey that they desire counsel to exercise restraint and not literally turn over every stone. Once this is communicated and understood, outside counsel can point out steps of marginal value that were not taken in the exercise of good judgment. If the litigation manager observes in the billings or status reports evidence of over litigating the case, the litigation manager can point back to the initial understanding to exercise restraint and refocus counsel on managing costs.

The objective of judgment based litigation management is to encourage litigation counsel to maintain a focus on exercising good judgment across the entire process as a means of counteracting the pressures and distractions that can prolong and increase the cost of litigation. Good communication of expectations and goals is critical in order to establish benchmarks against which good judgment can be exercised and evaluated.

#### *The Framework for Judgment Based Litigation Management*

While it may be easy to recognize bad judgment, the concept of good judgment in litigation is not merely the absence of bad judgment. Good judgment is a proactive concept. It involves decisions focused on increasing the probability of attaining an acceptable resolution promptly and at as low a cost as can reasonably be achieved.

There are various processes in litigation such as drafting a cause of action, developing a legal of strategy, written discovery, depositions, motion practice and negotiations. With respect to each of the

processes in litigation there are four potential areas where good judgment can be exercised, or missing. These general areas are:

- Legal
- Practical
- Cost
- Creative

Basic legal judgment involves the ability to correctly analyze the law and facts in order to present a reasonable legal position on behalf of the client. However, good legal judgment involves more. To qualify as good legal judgment, the legal position put forth should be calculated to reasonably enhance the probability that a satisfactory resolution can be reasonably expected to be achieved in a prompt and cost effective manner.

For example, lawyers often plead all potential legal theories and make aggressive claims for damages. While the positions may be sustainable, the evaluation focus should be on whether the broad, aggressive pleadings will encourage a prompt, cost effective resolution of the dispute. Broad, aggressive pleadings may give opposing counsel the basis for convincing his or her client that your company is unreasonable and that early settlement is unlikely. Such pleadings may ignite motion practice attacking the pleadings that will add certain cost but will be very unlikely to impact the outcome. On the other hand, if the objective is to deter potential plaintiffs from filing similar claims, aggressive pleadings that raise the stakes and the cost of litigation may be perfectly appropriate. Again, the judgment has to be aligned with the goal of the litigation and then consistent with achieving that goal in a cost effective manner.

From the litigation management perspective, the question is whether the claims are asserted because they can be or because they should be in order to enhance the probability of achieving the defined range of acceptable resolution cost effectively. The same analysis applies to other judgments made throughout the litigation process. Parties may be entitled to broad discovery, but what is the scope of discovery that is really needed to get the case in the range of acceptable resolution?

The adversarial nature of litigation, combined with the duty of lawyers to zealously represent their clients, can impede the exercise of good practical judgment in the day-to-day process of litigation. A common area where good practical judgment is compromised is with respect to disputes over discovery. One side, either your attorney or the other party, may demand overly broad and burdensome discovery even though such extensive discovery will not likely impact the outcome of the litigation. In another case, a party may resist even reasonable discovery, forcing costly motion practice. Experienced litigators should be able to resolve most differences over discovery through negotiation and compromise. When the litigation involves extensive fees relating to discovery disputes; it is likely that at least one of the attorneys is not exercising good practical judgment. A good litigation manager will want to make sure that it is not his or her attorney who is not exercising good judgment in discovery matters.

When litigation is staffed by lawyers of varying levels of experience, it is important that the senior lawyers monitor the practical judgments of attorneys with limited experience. The ability to find practical solutions to issues is, at least in part, a function of experience. Junior attorneys also may not have the confidence to compromise on issues. In managing outside litigation counsel, one will want to understand how discovery is managed and the role of senior counsel in avoiding and resolving disputes.

While all areas for the exercise of good judgment involve the consideration of costs, the area of cost management should be considered separately in assessing and encouraging good judgment. The first issue is the fee structure. Does litigation counsel suggest a case appropriate alternative to a strictly hourly based fee structure? For example, will the firm suggest an hourly fee that declines with the hours billed to the matter? Certain cases may be appropriate for either a flat fee or a reduced fee and success bonus. The litmus test is whether the outside counsel takes the lead in suggesting an alternative to a strictly hourly fee structure, especially if the rates are high. If the outside firm seems reluctant to use alternative fee structures, even greater care should be exercised in monitoring the judgments that can significantly impact total litigation costs.

Staffing is another initial area for the exercise of judgment at the outset. Firms routinely promote the use of associate at lower hourly rates\* as a means of containing costs. However, without information

about the level of experience of associates who will work on the case, in-house counsel has a limited basis for assessing whether staffing reflects good judgment or the need of the firm to either train or find work for underutilized lawyers. Outside litigation counsel should control staffing, but outside counsel should also provide information to support the judgment for staffing decisions.

During the litigation process, the judgments relating to costs need to be assessed and counsel encouraged to focus on containing costs. There are a number of approaches used by insurance companies, such as rigid litigation guidelines and billing rules that are subject to computerized analysis. Other companies involved in commercial litigation will need to find a more flexible approach. There are various alternatives, but one simple approach is to ask that each bill be accompanied by a brief statement from lead counsel concerning efforts, decisions or steps taken during the billing period that were aimed at reducing costs. The examples could range from avoiding travel costs by attending a deposition telephonically to avoiding motion practice by negotiating a resolution of a discovery disputes. Simply requiring such a statement as part of the billing process will encourage outside litigation counsel to focus on cost control.

Finally, litigation counsel should exercise good creative judgment. This may be the most difficult to encourage and assess, as creative solutions are not always available.

Creative judgment in litigation involves combining legal, practical, cost judgments with an understanding of the clients' business interests involved in the litigation. Creative solutions can involve the effective use of alternative dispute resolution, creating non-monetary components to a settlement or streamlining the discovery necessary to get the parties to the point of settlement. Critical to finding creative solutions is a clear understanding by outside counsel of the business issues and objective of the client, which is why the litigation management process starts with defining the range of acceptable resolution. The creative litigator adds real value by getting the client into that range more efficiently and in ways that may not be obvious.

Litigation can be a plodding process, with lawyers ambling through discovery and motion practice without seriously analyzing alternatives. Simply asking what other options are available or were

considered before deciding on the recommended course can provide some understanding of whether litigation counsel is simply plodding down the worn path or is looking for a new, shorter route.

### *Applying the Tools to Judgment Based Litigation Management*

There are basic tools used in litigation management, including:

- Fee structure
- Staffing review
- Early case laws and evaluations
- Periodic status reports
- Case budgets
- Bill review

Judgment based litigation management uses these same tools, but the process looks at some different points and asks some different questions. For example, bills are not reviewed simply to see that the case is on budget, but rather they are also reviewed from the perspective whether efforts are being made to reduce costs and bring the case in under budget.

The following are some additional examples of how the traditional litigation management tools are approached from the judgment based process:

- The fee structure should be aligned with the goals of achieving acceptable resolution promptly and reducing costs, which often is not the case with the standard hourly fee. Examples of alternative fees would be hourly rates that reduce as the litigation proceeds, flat fees, significantly reduced fees with success bonuses and contingent fees.
- The appropriateness of staffing should be reviewed in terms of cost-for-experience and the areas of responsibility. The fee agreement should address how costs associated with changes in staffing will be handled.
- The initial case plan should outline not only the recommended course of action, but also possible alternatives considered but not recommended.

- The initial case plan should outline a strategy, and the steps for getting the case in a position as promptly as possible where a reasonable potential for settlement could be expected (Phase 1 of litigation). The plan can then detail the strategy and additional steps if settlement is not obtained at the target point.
- The budget should track the case plan in outlining costs to get to a reasonable settlement and then additional costs to get to trial. The budget should be broken down into milestones.
- The periodic status reports should address how the actions and developments relate to the initial case evaluation and what modifications, if any are necessary.
- The billing format should be in broad categories, such as motions, research, written discovery, depositions and meetings/communications. This will allow for easier assessment of where time and money is being spent, as compared to a simple chronological reporting of time billed.
- The bill should include a statement by responsible counsel of steps taken during the period to contain or reduce costs. Examples might be negotiating a solution to a discovery dispute, telephonic attendance at or minor deposition, or steps to reduce travel costs. Simply making this part of the billing process can help maintain the proper focus.

The above are just some basic examples of how traditional litigation management tools can be employed to support judgment based litigation management. Companies will likely vary on how they use traditional litigation management tools to encourage and assess the ongoing use of good judgment throughout the litigation process.

Litigation management should involve more than simply being informed about what is happening and how much it is costing. The goal of parties in the vast majority of litigation should be to resolve the dispute as promptly as reasonably possible and with litigation expenses as low as possible. Judgment based litigation management is designed to help parties achieve the goal by focusing litigation counsel on constantly exercising judgments aimed at achieving the goal of finding a prompt, cost effective resolution.

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\* Insurance companies focus on rigid procedures, low fee lawyers and electronic bill audits as means of driving down their costs. However, insurers are in the bulk litigation business. The settlement value range of a broken arm is fairly well known, and the litigation process is more routine. The techniques employed by insurance companies will not work for most commercial litigation handled by corporations.

\* A National Law Journal survey done in 2003 showed that large Chicago firms were charging about \$275 per hour for a fourth year associates. Lower hourly rates is a relative term.