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Win First, Win Smart:

COLLABORATING YOUR WAY TO SUCCESSFUL LITIGATION

By Mark J. Larson and Don G. Rushing

30-SECOND SUMMARY

Litigation planning involves risk assessment and strategic budgeting to align objectives and costs. A good litigation plan should clearly identify the client's goals, and in-house and outside counsel should collaborate at the beginning of the case in order to achieve alignment with those goals. Next, the litigation team must develop a detailed list of the tasks to be accomplished and how much it will cost the company to complete those tasks. You can control costs by improving efficiency in the execution of litigation plans by enabling team members to do their jobs and avoid decision-making bottlenecks. A litigation team's progress along the road to victory is made possible by the skills they possess and how well team leaders manage those skills.

Companies litigate to protect and advance their business interests; they don't do it for sport. Achieving corporate business objectives through litigation depends heavily on a good plan executed carefully by a skilled team. So how do we get there? What should companies expect from both their in-house counsel and outside law firms when it comes to effective litigation management?

Chart a path to success

One of Sun Tzu's lessons in "The Art of War" was that, "Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win." Litigation isn't warfare; country isn't pitted against country, and no one dies. But Sun Tzu's lesson about the criticality of preparation applies equally to what trial lawyers should do for their clients. Successful litigators win by starting with a plan calculated to accomplish their client's goals. It sounds fairly straightforward, but we often miss this simple point. Litigation shouldn't be driven by what is *permitted* under the rules, or what generates fees for the law firm, but by what is *necessary* to advance the client's interests. It isn't about the lawyers. It's about the clients.

If war is politics by a different name, then litigation is business by a different name. Litigation planning, like business planning, involves risk assessment and strategic budgeting to align objectives and costs. Companies seldom take a "win at all costs" approach to litigation. Careful risk assessment and budgeting at the front end will avoid a Pyrrhic victory that is won at such great cost that it simply isn't worth winning. Your planning must chart a course that does not expose the company to greater risks or costs than it is prepared to bear.

Begin with a plan. The late Bob Raven, a Morrison & Foerster trial lawyer, liked to call it a "Roadmap to Victory." A good litigation plan should clearly identify the client's objectives and the route to follow to realize those objectives. And good litigation plans are the result of a collaborative process between in-house and outside counsel at the beginning of the case to achieve alignment on the goal to be achieved — a goal defined in light of a realistic appraisal of what is possible and what is not. A good place to begin is with the preparation of a formal case assessment — preferably within the first 90 days of the litigation. This is the way to ensure that the client, in-house counsel and outside counsel share common goals for the litigation and are on the same page, in terms of both strategy and tactics, from the earliest stages of the case.

As part of the formal case assessment, it is certainly important to outline critical information about the assigned judge, the jury venire and the opponent. To the extent they are known, lay out the key facts, witnesses and documents. Briefly summarize the key legal principles that will govern the dispute; and then imagine the possible case themes each party is likely to pursue. Pay special attention to the company's business considerations bearing on the litigation. Discuss what success looks like. After all, any good plan needs a measure of what a good result will be. What is at stake? What are the business relationships at play? What does the company think about the litigation? What are the time constraints? What is viewed as possible, and what is not? A realistic definition of the client's ultimate goal is the Polaris that will serve as your guide through the litigation.

This is sound planning, but it is also sound expectation management. Too often — particularly in an effort to win business in so-called "beauty contests" — lawyers over-promise what they can deliver and understate the likely costs to get there. This creates inflated expectations that will be tough to meet and leads inexorably to strains in the attorney-client relationship. Every effort should be made at the outset of the case to realistically appraise what is possible and what it will cost to achieve the possible. Don't be afraid to identify the challenges of a case and candidly discuss what it will take to meet those challenges. This can be done formally in a detailed decision-tree analysis that identifies decision nodes, outcome branches and payoffs, and allows the computation of expected values of the various outcomes. This also can be done informally by discussing with your client the key events anticipated in the case, the probable outcomes and the likely effects of each outcome on the litigation. You absolutely must identify for your client the likely forks in the road, what the downsides and upsides are, and where the decision points are likely to be encountered as the case progresses.

On the other side of the coin, don't focus too much on the negatives. Lawyers — whether in-house or outside counsel — are naturally risk-averse, and are trained to spot risks and lay them out for the client. But the potential upsides to the suit and any advantages the company enjoys should not be undersold for the sake of protection against potential criticism later that the client wasn't adequately warned. In short, a balanced view of the case is essential. Don't be too much of a Tigger and don't be too much of an Eeyore. This is the time to be open, honest and realistic about the company's prospects. The importance of sound client communications

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to gain alignment about litigation objectives, and to manage expectations about what is possible and what isn't, simply can't be stressed enough.

Develop a case roadmap

Your overall litigation plan in the case assessment identifies the company's goals, the end point you will strive to reach and the big steps along the road to that goal. The case assessment describes a shared vision between the client and its counsel of the goals for the litigation. But to manage effectively toward the goal, the litigation team must develop a *detailed* list of the tasks to be accomplished — call it a case roadmap. This is a list of tasks that constitute the tactical steps to be taken to reach the client's objective. In project management parlance, this is the law firm's work breakdown structure.

To do this most effectively, work backward from the end. Civil litigation is a rule-governed pursuit from beginning to end, and the typical end point is the jury charge. (In a bench trial or arbitration, this will be the trial brief outlining the legal principles the court or tribunal will apply to the facts of the case.) In the earliest stages of the case, prepare a set of simple jury instructions on the substantive law, as these tell you what the parties must prove in the case. Then envision the closing argument you want to deliver. Be as specific as you can be. What's the big theme of your case, the storyline that stitches the facts and law together in a coherent whole for the jury? What facts will you offer to back up your theme and to satisfy the elements of proof for the claims or defenses? What demonstrative exhibits do you need to provide the visual dimension to your narrative? This is a crucial exercise; spend some time on it. Without it, you will have difficulty identifying the steps necessary to pull the case together so you can deliver the closing you imagine. Then make a list of the steps that you must take to marshal the facts you need to prove to give that closing argument.

At this point, you may be saying to yourself: "I don't need to worry about a jury trial; we'll never get that far and will either settle the case or prevail on dispositive motion!" Not so fast. Of course companies want to get out of suits as early as possible for as little as possible. And of course few cases actually go to trial (less than 2 percent of all federal filings are resolved through trial). But that begs the question how to most effectively manage to the desired result, even if the case never goes to trial. Cases that are prepared from the outset by an experienced trial lawyer with an eye to the end game are invariably litigated in a more focused and cost-effective way, because unnecessary steps are avoided and effort is expended only on activities that make a difference. This approach also produces better results, because the other side usually understands that the company knows what it is doing and will be *prepared* to try the case if necessary.

The case roadmap is also a way of defining not only what should be done, but also ruling out tasks that should not be done because they are not cost effective. And the first draft of the case roadmap will not be your last. You won't be able to capture all tasks at the front end of the case. Litigation is an iterative process that requires constant flexibility. As the case proceeds, many of the steps you initially outlined will be completed, others will be abandoned, and new ones will be added. But there is a real power to laying out the tasks at hand in the beginning. How do we do this?

The case roadmap is the law firm's primary command-and-control device in leading the outside counsel team and managing the litigation process. Typically, the task list is for the law firm's internal management purposes, but in-house counsel should expect that their outside counsel will have such a list, actively manage with it and periodically report on progress in the case. What should in-house counsel expect of their outside law firms in this regard?

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Proper prioritization of tasks is critical to efficient execution of the litigation plan. The firm should prioritize tasks by asking: What is important? What is urgent? What must come first before other things are possible? What really doesn't need to be done? Then order the tasks in a way that puts the urgent and important ones first.

Clear assignment of responsibility for individual tasks is important to avoid duplication of effort or dropped balls. Each task on the list should have an assigned team member responsible for its accomplishment and a due date. The task list should also have a block that will allow the firm to update the status of each task as the case progresses. And task lists should be updated frequently, checking off and retiring the completed tasks, determining what has changed, and adding new tasks as case demands dictate. Frequent updates for the company on the firm's progress should be given so that the alignment on the plan and budget achieved at the beginning of the case continues as the litigation moves forward. Outside counsel should remember that it is the company's case, not theirs, and the company needs to know how the litigation team is progressing in accomplishing the plan.

Prepare a strategic budget that predicts the costs of the tactical steps you identified. Spreadsheets were designed for exercises such as this; use one.

Good case roadmaps try to deal with risk and uncertainty, but good trial lawyers also must prepare to deal with unknowns. These are not the same. Risks and uncertainties are events that can be anticipated, in some way quantified, and evaluated. These include the average length of time it takes to get a case to trial in a particular jurisdiction, the probabilities of drawing a good judge from a particular panel, predictions of how a witness will perform at trial, and estimates of damages awards for a typical case in a certain venue. We can assess these types of risks because we can anticipate something about the future based on our past experiences as litigators. Unknowns are the surprises we didn't see coming despite the application of experience and the exercise of logic: the damaging document we didn't know existed, the change in the regulatory or legal landscape we couldn't anticipate, or even the perverse or self-defeating behavior of the other side that runs contrary to reasonable expectations. Leave room in your case roadmap for creative adaptation to unknowns, but company decision-makers should have a realistic sense of the odds of success based on the known risks and uncertainties. Without this step in the planning process, you're asking the company to place a bet without knowing the possible risks and payoffs.

Also, look for creative solutions along the road that will shorten the trip and make it less expensive for the company. This is the "right brain" work that we went to law school to do but probably didn't learn there, the out-of-the-box, game-changing approaches that get the company to the goal more quickly and cost-effectively. Is there a business solution that will end the dispute before it begins? Is there a more favorable forum, either foreign or domestic, to which the case can be moved that will change the law, jury venire or damages available in a way that is beneficial to the company? Are there ways of trimming down or disposing altogether of the case through motions or early discovery? Can we develop or exclude evidence that will change the balance in a way that helps the company? Ideally, the winning solutions will be baked into the original plan. But frequently, these will occur to you as you learn more about the facts of the case.

Prepare and manage against a strategic budget

As noted, a critical part of the planning process is a strategic budget or cost estimate. The company needs to know the likely cost of the litigation. Businesses don't invest in a new plant, hire a new employee or launch a new product line without a sense of what the cost will be. Why ask the client to pursue a particular litigation plan without a sense of what the likely investment will be? Prepare a strategic budget that predicts the costs of the tactical steps you identified. Spreadsheets were designed for exercises such as this; use one. List the steps in your plan, identify the resources that will be used to accomplish each step, estimate the time needed by the team to complete the step, compute the cost of the step, and then sum the costs of the individual steps. Be specific about what you anticipate doing and what the other side is likely to force you to do. Don't forget typical expenses, such as filing fees, travel, court reporters and expert witness fees, in your budget.

Once you have a strategic budget for the case, you are then in a position to engage in a conversation about whether the costs and risks are tolerable, given the company's goals. And you are also in a position to discuss trade-offs the company may wish to make in the way the litigation is to be conducted. How much discovery really is justified, given the stakes? If the odds of success on a summary judgment are low, why bother? At what point will the costs of the litigation outrun a contractual damages cap, insurance policy limits or the ability of the opponent to pay damages? These types of questions are best answered at the beginning of the case and with reference to a strategic budget that makes litigation costs transparent.

A good strategic budget will also place the company and its outside counsel in a position to consider the propriety of fee arrangements that are an alternative to hourly rate billing. This is the right time in the case to discuss ways of structuring a fee arrangement that offers the company the opportunity for greater cost predictability and risk sharing, and the law firm the opportunity for greater reward when it delivers real value in the engagement. Fee arrangements should be tailored to the circumstances of the individual case. Some companies are just more comfortable working with outside counsel on an agreed hourly rate, using the strategic budget to anticipate and control litigation costs. Other companies have developed a comfort level with fee arrangements that involve full or partial contingent fees, flat fees for specific phases of a case or tasks in the litigation process, or reduced hourly rates in exchange for success fees for the speed with which the litigation is concluded or the result that is obtained. The manner in which the outside law firm will be paid for their services, however, should be decided at the outset. For outside counsel, this is also an ideal time to demonstrate to your client that you're not just in it for the money, but also to watch out for their best interests. Even

if the client doesn't raise the possibility of an alternative fee arrangement, take the bull by the horns and do it yourself. Be creative and demonstrate, to the extent possible, the mutual alignment of your goals.

One more point: The litigation planning process does not end with the preparation of an initial case assessment, case roadmap and strategic budget. As noted above, things inevitably will change during the course of a lawsuit. We plan our side of the case. We try to do a good job of anticipating what the other side will do and how a judge may rule at various points in a case. But at best, we only control a third of the case; our opponent and the court control the other two-thirds. And we have even less control in multi-party cases. So we don't plan just once; our plan evolves with each twist and turn of the litigation. We must make sure the company decision-makers understand what the changes are and how they affect the chances of success and the costs of getting there. For example, if the case plan proceeded on the assumption that, given the size and complexity of the case, limited ediscovery would be ordered, but the court allows more extensive — and costly — discovery, then the case budget and the risks and rewards of the litigation must be recalibrated. The key is unrelenting communication. Outside counsel should let their client know the moment that a key assumption underlying the case assessment and budget has changed. A reasonable client will understand the ramifications of a change in circumstance if informed about it early on. That same client may not be so understanding if outside counsel busts the budget without any advance warning or explanation.

A good strategic budget also will reap cost savings for the company. To state the perfectly obvious, litigation can be an expensive process. Litigation cost drivers include the number of tasks to be completed (complexity), the number of hours per task (execution efficiency) and hourly rates (resource price). In economic terms, litigation costs are a function of the price of each of the resources committed to the tasks and the quantity of each of those resources invested in the litigation: $C = P \times Q$. Both the price and quantity terms of the equation must be controlled to make the whole endeavor economically rational for the company.

Price is controlled not by simply using the lowest cost provider, but by using the most cost-effective one. Both in-house counsel and the law firm should be looking for the team member that will render the greatest value for the price: the most cost-effective resource. That resource may be a company employee, lawyer or paralegal, a senior law firm partner who can give a piece of sage advice that saves time and avoids pitfalls, a junior law firm associate who has just researched the same legal issue and can answer the question quickly and correctly, a paralegal who has managed dozens of document productions and has raised document management to a fine art, or another law firm or outside vendor that is set up to do something more efficiently than the firm assigned the case. Assign tasks to the team resource that will provide the highest value, total cost and quality of work product considered.

Quantity is controlled by what you do and how efficiently you do it. We control costs by avoiding activity for activity's sake. If it doesn't move the company down the road to victory, a task isn't worth doing. Throw it out. We control costs by agreements to streamline the litigation. Can agreements be reached with the other side to eliminate issues, limit discovery or order the litigation so everyone reduces the expense of the dispute? This approach to litigation is not just professionally virtuous; it is economically beneficial for the company. We control costs by looking at every turn for the most efficient way to perform a task through reuse of previous work product. If you can find existing work product — previous research, briefings or outlines — that will shorten the time needed to accomplish the task, use it (and the outside law firm should charge only for the effort to update, modify and adapt the work product to the case at hand). There is no need to reinvent the proverbial wheel.

And we control costs by staffing leanly and avoiding turnover on the team. Any lawyer or paralegal added to a matter who isn't adding value is a waste of company resources and makes the team less efficient and, therefore, more expensive and less effective. The company invests time and money in educating team members about the case. Limiting team turnover preserves that investment in the team member who already knows the case and avoids the cost of educating a new team member.

Finally, we control costs when we improve efficiency in the execution of litigation plans by enabling team members to do their jobs and avoid decision-making bottlenecks. Communication of the litigation

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Top five ways to control litigation costs

1. Start with a litigation plan and a strategic budget to support the plan.
2. Decide what tasks aren't worth doing, and don't spend money on them.
3. Use a task list to move work to your low-cost provider and avoid duplication of effort.
4. Compare costs incurred with costs budgeted, and adjust the plan and budget as required.
5. Staff leanly and avoid turnover on the team.

plan to the team members is critically important to the team's success in accomplishing the client's goal. All team members need to understand the context in which they are operating and how their individual effort fits into the overall plan. If they are given responsibility for a task, they also must be given the necessary authority to get the job done. Communicate to each team member the objective of the task ("We want to dismiss the third count on standing grounds."), the deliverable ("I need a rough draft of the motion to dismiss."), the due date ("I need this in two weeks."), the resources that may be used ("Here is an example of a similar motion. Please use Sandy to update the research.") and a time budget ("We should be able to do this in 20 hours."). Be prepared to follow up and provide coaching, but resist the temptation to micromanage the task. Your job is to lead the team, not do everything yourself. But it is also your job to hold accountable those assigned a task, both for the quality and timeliness of the work product.

If you insist on each team member consulting with you about every step along the road, you also will create bottlenecks in information flow and decision-making. This will impede progress. Remember that your time is, in economic terms, a constrained resource. You do not want limits on your own availability to prevent team members from completing their assigned tasks in a timely fashion. Delegate, follow up, coach and cheerlead, but don't get in their way of getting the job done for the client.

Team-building for constant improvement

Your team's progress along the road to victory is sustained by the aggregation of its skills: the skills of the in-house counsel and the law firm that are brought to bear on the problem to be solved. This bundle of skills, the human capital you manage as team leaders, is built over time through formal and continuing education, training, case experience and mentoring. Use the litigation experience as an opportunity to improve the team's skills by taking the extra time to coach team members as the case progresses. This is an investment of your time and energy, but an investment that will pay dividends for the company. Give feedback on each assignment so each team member learns not only by doing, but by your teaching and example as well. Not only will you find this professionally and personally rewarding, but your team members will grow from the experience and provide greater value not only in the current case, but future cases as well. Make it a point to share lessons learned in the litigation with others within the company so that future mistakes that precipitate litigation are avoided. The outside law firm can and should be enlisted in this effort, and most firms are happy to add value to the relationship by providing this service without charge.

Litigation teams are made of smart people who think for a living. This presents both a great leadership opportunity and a challenge. Who wouldn't want to lead bright people in an interesting case? But the challenge is to channel the team's thinking in a planned, organized and economically efficient way toward the client's goal. There is no secret to success in this endeavor, only the application of fundamental project management principles to litigation. Begin with a plan that will chart the path to success. Execute the plan through careful management of the tactical steps along the way. Build the team through continuous investment in its training and motivation. If you and your outside counsel succeed in managing litigation for the company in this way, goals are shared, interests are fundamentally aligned and expectations are effectively managed. And, if all goes according to plan, success as you defined it is assured! **ACC**

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