Litigation Doesn’t Have to Be Bad News for Your Company — Or for You

Litigation and Dispute Resolution

This may be bad news for some in-house litigators out there, but what you do is viewed as a distracting, aggravating expense to the enterprise. To change this perception, you should litigate only to improve the company's business. You should forget litigating with the mindset you may have been taught at a law firm, to prove you are "right," or to satisfy some abstract legal principle. Your job is all about adding value to the business.

I started my career as a trial attorney, and launched my in-house career as a litigator at Pacific Northwest Bell, so I speak from experience. Let's face it: Unlike a law firm or an enterprise where litigation is a part of the business (such as property or casualty insurance), your business probably does not make money through the litigation process. It loses money, and lawsuits are a significant distraction from the core enterprise. For this reason, I have counseled my in-house attorneys who want to advance that they should focus on the areas of the law that are close to the profit center, or mission, of the business.

Nonetheless, your litigation skills and the results you achieve in the litigation process can serve you very well. This happens in three ways: in the efficient handling of disputes, in the proactive pursuit of adverse parties or issues, and in strategic litigation.

Keep in mind that approximately 97 percent of all civil suits never go to trial. Therefore, unlike law firms that make money working on that 97 percent, it is only an expense to your enterprise. For that reason, I advise my litigation attorneys to pick the best 10 percent of the disputes they are handling and work on them — knowing that the majority will likely be resolved prior to any trial. For the other 90 percent: evaluate and dispose, evaluate and dispose.

Efficient dispute resolution requires the prompt evaluation of each matter, together with the development of a strategy to eliminate the risk at the lowest cost possible. Many lawyers claim that a matter cannot be evaluated until after they have completed initial formal discovery. Why? In most

circumstances, the company has 90 percent of the facts relevant to a particular dispute before discovery is conducted.

Lawyers can investigate the facts informally and make an accurate estimate of the value of a particular risk or dispute within a short period of time, without any discovery whatsoever. There's a saying, and probably an accurate one, that the litigation process incurs 90 percent of its cost attempting to discover the last 10 percent of the facts. This high-cost exercise usually far outweighs the value of the information obtained.

The following simplified example involving a settlement or award of US$90,000 in a classic tort action will show the high cost of litigation. The plaintiff's personal injury attorney usually receives one-third of this amount as a fee, leaving the plaintiff with US$60,000. Since defendants conservatively spend, on average, as much in defense of the litigation as the plaintiff spends in pursuing the case, it is fair to assume that US$30,000 is spent in this defense (this amount is likely much higher due to the responsive and hourly billing mode of outside counsel's defense practice). Thus, the overall cost of the litigation to the company is US$120,000 (settlement amount (US$90,000) plus defense attorneys' fees (US$30,000)).

Any business person who advises an industry to spend X to move Y from point A to point B would likely see great opportunity in entering this industry. Unfortunately, here the typical hourly basis for compensation removes the incentive for efficiency. Despite the current surplus of lawyers, for some reason, both the suppliers (the lawyers) and the purchasers (in-house counsel) have resisted moving to a payment model that increases efficiency over hours invested. Nonetheless, through the development of appropriate processes and procedures, dispute resolution efficiency can be improved, to the benefit of both business and society. Perhaps because I was responsible for the technology area in my final role at MassMutual, it is my belief that the use of technology and data analysis should allow disputants to quickly determine how a particular fact pattern might play out, statistically, and share the 50 percent that in the past was paid into the legal system. That would eliminate the outrageous frictional cost of litigation and be a benefit to all — including the court system.

Every company should train its litigation team to use a structured probability-type approach to evaluate risk.

A simple example involves a company with a portfolio of property damage claims — all with US$100,000 in claimed damage. If there is a 50 percent chance of loss for each of these cases, then the value of any one case is US$50,000. Thus, assuming there was no cost involved in resolving a particular matter, every time a claim could be resolved for less than US$50,000, there is a net benefit to the company (a US$45,000 settlement results in a savings of US$5,000). If the matter cannot be resolved for less than US$50,000, it should be tried. On average, the damages will come out to US$50,000. Adding defense attorneys' fees to this example complicates the analysis, but only slightly. Assuming the anticipated attorneys' fees to handle each of the above cases were US$10,000, then any settlement of less than US$60,000 benefits the company. This holds true only if the case is properly evaluated, and there is no increase in repetition of similar claims by resolving the matter between US$50,000 and US$60,000.

The alleged reputation of a "non-settling," or "tough," defendant may have some value, but is hard and expensively fought for, and does not often occur. The litigation process generally leaves very unhappy customers, suppliers, and employees. The company must continue to interact with most of these parties regardless of the outcome of the dispute. Thus, the litigants are left in positions that can cause more acrimony and create greater costs in any future relationship. And the reality is that 97

percent of civil cases will be settled prior to trial, often late in the process based upon significant pressure from the courts, after wasting the frictional cost of discovery and motions.

Suppose a company was to attempt to reverse these statistics, and follow a “non-settling” strategy. Using the previous example of a case valued at US$100,000, the company would, on average, pay US$50,000, plus US$10,000 in attorneys’ fees. Yet the company would not receive the savings of any “good” settlements below US$50,000, would incur business interruption costs, and would have no ability to resolve the matters on the basis of an exchange of goods or services.

Additionally, the company would likely incur reputational costs, through adverse press coverage on the 50 percent of the cases where the plaintiffs recovered US$100,000 (the plaintiff ’s bar is well versed on how to publicize victories). Whereas, if all the cases were resolved, and the settlement agreements contained a non-disclosure provision, there is additional value to the company of no negative publicity, and the reduction of potential additional “copycat” litigation as a result of the plaintiffs’ publicity. Finally, my experience is plaintiffs generally are willing to resolve matters at a value below the analyzed settlement value — they simply do not have the assets and are more risk-averse than a large corporate defendant.

Thus the first step in efficient litigation management is to quickly evaluate the risk or exposure of any particular dispute. This should be completed within 30 days of receipt of the claim. Then a strategy should be put in place as to how the matter will be resolved. This may require some discovery or motion filing (though it usually does not). But the strategy should be clear. In-house counsel should not emulate the wasteful ways law firms handle a claim, which is to commence the litigation process and then just look for “opportunities” to settle along the way. Always keep in mind that law firms paid by the hour have an incentive to not rush to find such “opportunities.”

In contrast, an area where litigation can benefit your enterprise is to seek recompense when your contractual rights have been violated. I would challenge each of you to create a list of the commercial disputes that you are defending. Using the risk-weighted analysis outlined above, calculate your overall exposure. Then ask yourself: Do we have an equal value in the claims we are pursuing?

In dealing with suppliers and vendors, why are there more defensive claims than offensive claims — does your company really operate more illegally than its suppliers? You need to take steps to actively identify such opportunities for offensive claims. Good ways to do this include developing the data outlined above, and making your business clients aware of the discrepancy. In addition, you should make clear that your team will develop a similar risk-weighted evaluation of any particular claim, so a business decision can be made whether it makes sense to pursue. You must pursue these cases in the same lean and mean manner that you use to defend cases.

As an attorney at US WEST, I led the team to seek compensation for asbestos damage to our buildings. We were one of the few private property owners to make these claims. After recovering over US$10 million, the business had a different view of our litigation team, and our value. A well-run litigation team can become a profit center for the business in the area of commercial litigation.

Aligning attorneys with the core business, and enabling in-house lawyers to work alongside the business team, can create visibility and opportunity for such affirmative claims. In addition, these relationships create opportunities to mitigate the risk of future litigation. Or, if litigation arises, a knowledgeable in-house team could have proactively made the facts as strong as they can be and as defensible as possible. In-house lawyers (and especially litigators) are in a unique position to play a crucial role in avoiding unnecessary litigation, making the inevitable disputes objectively “better” from

the company’s perspective, and enhance the odds of a favorable outcome from the company’s perspective.

Finally, do not misjudge the value of using litigation strategically. One of the advantages of developing a significant patent portfolio is that it gives you opportunities to protect and monetize your intellectual property rights when others try to infringe on them. In addition, corporate teams invest much time looking at the ways they can use their government relations teams to change laws that are detrimental to the business. Don’t undervalue the potential benefits of litigation to drive such changes.

When I headed up litigation at US WEST, we brought a lawsuit to relieve the company from regulations that had required incumbent telecommunications companies to obtain customer approval before they could use their customers’ records and personal information for marketing purposes in wireless markets. These regulations caused large incumbent telecommunication providers to have no advantage in marketing to their customers, while new competitors and carriers in other related businesses could market new services (including telephony) to their existing customers. The court ruled in our favor: The regulations violated US WEST’s right to free speech under the First Amendment.

This ruling provided US WEST with a legal competitive advantage for its marketing efforts as it competed with new entrants and other carriers.

Litigation is probably not central to your business. But almost every enterprise has to address it. A well-run in-house team will develop standard processes to evaluate all claims — defensive and proactive. You must create clear strategies on whether, and how, to pursue these matters. Data must be maintained on all claims, to be used to create countermeasures to reduce recurrent issues and to assist in future dispute resolution efficiency.

Finally — look for those opportunities where litigation can be used strategically as a way to advance business objectives. Efficient, proactive, strategic litigation can serve your company — and you — very well. But at the end of the day, litigation is all about strengthening and protecting the company’s business.

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