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# Mining for Information Gold— Using Litigation Materials to Improve Your Legal Department

**Litigation and Dispute Resolution**

## CHEAT SHEET

- ***Create more credible compliance persuasion.*** Expect and prepare to cope with client skepticism.
- ***Remember the lesson of civil procedure and evidence classes.*** A litigant has not only the burden of proof or persuasion, but also the burden of mustering up admissible evidence.
- ***Do better business due diligence.*** At least for larger deals, hunker down in the other side's court history to spot and avoid easily detected evidence of high incidences of post-dealings disputes.
- ***Reap rewards.*** Litigation materials can be your friend — creating more credibility for the contributions of in-house counsel to litigations.

Have you and your colleagues overlooked an available, invaluable resource to enable better executing legal department objectives?

Might you appreciate a new tool to achieve excellence?

Can you or a teammate convert a stereotyped bad attribute regarding lawyers into a good reputation that captures new attention, credibility and cooperation from your fellow employee clients?

Yes.

It's a common myth that litigation is only good for fee-based litigators. But those resourceful in-house counsel who care to create better processes and awareness can hunt, find and mine written materials created by others' prior lawsuits to accelerate achieving their, and their clients', objectives.

## Pleadings, your contracting ammunition depot

Precedent isn't found only in judges' quill pens and computers.

Have you ever had a soon-to-be transaction counterparty assert, "Nobody agrees to that term," or claim, "We've never agreed to that!" but not believed it? Haven't you ever wished you had evidence against such rhetoric and stonewalling?

By checking the contract litigations of that party and other entities, often you (or your paralegal) can identify and download actual, prior signed agreements. Then you can let those prior pleadings be precedent for the reasonableness of your position.

Worried about needle-in-a-haystack return on time investment? Assuming a boil-the-ocean time sink? Well, you needn't. In the database of US federal lawsuits, you can search using a combination of search factors to narrow the scope of your results. You can search within designated contract cases (PACER category 190), trial court, party or litigator name and/or time range. And there are dozens of

other categories to facilitate focused research. (See the accompanying sidebar, “How and where to find and mine pleadings” for the Web addresses of this and other repositories of litigation materials.)

**How and where to find and mine pleadings**

1. State and local: For free, you or a colleague can identify and collect materials from some nonfederal cases. Jurisdictions differ significantly regarding both “fee or free” and the ability to search via party name or also by litigator name (or bar number).
    1. Examples of freely searchable, and sometimes freely downloadable, litigation troves:
    2. Houston, TX (Harris County District Court) (free pleadings): www.hcdistrictclerk.com/eDocs/Public/Search.aspx
    3. Manhattan (New York State Supreme Court and the County Clerk of New York) (free pleadings): iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=654362-2012&Submit2=Search
    4. San Francisco (San Francisco County, CA, Superior Court): www.sfsuperiorcourt.org/online-services/verify?f=nsq
    5. Silicon Valley (Santa Clara County, CA, Superior Court): www.sccaseinfo.org/pa6.asp?display_name=index_party
2. Free US federal case materials: Via Internet research, sometimes pleadings from noteworthy, new-issues or controversial cases can be collected without charge.
    1. Increasingly, law firms’ marketing releases, individual lawyer blogs, academic commentary and news media offer selected pleadings to inform and bolster their analyses or draw broader audiences.
    2. When searching, use the better focused combined terms method. To get those more persuasive original courthouse filed pleadings, search “hits” using not only a lawsuit case name but also “.pdf” to gather actual pleadings and not just short “alerts” published by journalists or legal-services vendors.
3. Fee bearing federal research: For $0.10 per page currently, pleadings can be selectively downloaded from trial and appellate courts. (Advocacy in some quarters to make all federal lawsuit pleadings freely available have not yet succeeded.)
    1. To register for and then use the PACER system, go to pcl.uscourts.gov/search.

Creative counsel can collect value at limited cost; you can cull just a detailed case chronology, thus yielding useful details regarding lawsuits’ durations, strategies, motions, involved litigators, interim outcomes and rough costs. (And sometimes “free” can come from “please”: Some law firm litigators may be quite happy to hear an over-the-transom request for public-information, unsealed pleadings from a new-to-them corporate counsel, sensing a possible new client opportunity.) Moreover, long rulings and briefs arrive at a discount; PACER doesn’t charge for pages 31 and beyond.

## Creating more credible *compliance persuasion*, via disclosing disputes

Do you ever cope with clients who reflexively assert that all lawyers are worrywarts or Chicken Littles? Do you face constituents whose naïveté (or lucky dispute inexperience) enables their assuming (or just hoping) that both the odds and severity of lawsuits or government investigations

are actually smaller than media headlines suggest?

Remember the lesson of civil procedure and evidence classes: A litigant has not only the burden of proof or persuasion but also the burden of mustering up admissible evidence. Psychologists expect human inertia: Changing beliefs and habits require focus and effort. So smart lawyers should expect and prepare to cope with client skepticism.

You can meet your burden of moving forward with extra, independent and credible evidence of the relevance of your department's compliance coaching by deploying an independent, publicly available resource — litigation artifacts. Busy managers will look twice at other companies' train wrecks. (Perhaps your clients' reading about competitors' or suppliers' litigation is the commercial version of car crash rubbernecking: Everybody who drives by has to look.)

Why not supplement your internal advocacy about applicable new government rules and regulations by delivering documentation of actual instances of other organizations' pain and suffering? Show that you know business reality (and not just legal mumbo jumbo) by packaging up, with your counseling, selected pleadings from class actions, government agency enforcement actions and commercial lawsuits. Those courthouse fingerprints — sequentially numbered-pleading, court-specified, top-margin-stamped (in US federal cases) documents — can prove it's not just one fallible, individual lawyer talking, justifying his or her existence; this compliance principle is an external, objective and proven business parameter.

Upgrade your existing and future training curriculum with lawsuit artifacts, which have no ongoing licensing fees, unlike some available commercial content. (If reading legal English makes your fellow employees squirm and worry, maybe that will push more progress in avoiding unnecessary risks.)

## Better prelitigation expectations management by postmortems of your and others' prior suits: internal counseling

"Don't start a barroom fistfight when the other person carries a knife" and "Don't start an argument that you can't end" are sayings to consider before engaging in litigation.

Mining prior litigation enables more informed fight-or-talk, sue-or-stand-down, negotiate-or-litigate decision making.

Cull the chronologies of other cases to capture more realistic estimates of lawsuit durations, delays, costs, tasks and resulting demands on nonlegal managers. Extract examples of motion practice in order to Mirandize management on just how litigation, at least in many countries, grinds exceedingly fine. Deliver documents to management that preclude the common delusion of a hoped-for fast surgical strike and desired short lawsuit, which some colleagues aspire to start. If your clients, who are novices to litigation, believe a slam dunk injunction will deliver fast justice with modest costs, risks and time, go get pleadings from comparable cases to show the severity of applicable burden-of-proof, balance-of-harms and public interest standards. Learn early if the other side historically always settles before trial or has an established track record of always taking it to the jury or even appellate panels.

From an in-house perspective, postmortems are integral to rendering value to your company and its shareholders. The need for a "holistic" approach, managing risks in order to avoid disputes, should be a core competency of any legal team. Litigation is an irritant and takes businesspeople's focus

away from the core business. Making new law and trying cases are not — and should never be — core competencies of any company.

## Better litigation project management by post-mortems of yours and others' suits: assessing, managing and enabling external counsel

Has your CFO or general counsel ever experienced surprise or buyer's remorse upon receipt of your litigator's invoice or lawsuit status report? Has the legal department ever regretted the inability to control, or even affect, a lawsuit's cost, duration, tasks or strategy once under way? Won't your employer's senior management want evidence that legal has effectively, accurately and proactively first forecast, and then managed the actions of expensive, talented outside litigators on your behalf?

Before selecting litigation counsel, doesn't your organization want to know the extent of your prospective litigator's actual cases taken to trial or more details regarding her win-loss record?

When planning or managing litigation, why just rely on a vendor (i.e., law firm) asserted experience, expectations and assurances? Don't savvy customers of any high impact, high dollar professional service — be it surgery or construction — now know to go find and use external benchmarks before greenlighting that highly skilled, big ticket vendor? (Would you deliver your child for surgery without an Internet research regarding the procedure and selected physician?)

PACER-mined pleadings can supplement hearsay from colleagues, seminar content and other merely partial data and litigation lore. For example, courthouse filings reveal how many litigators were designated to a particular case, how soon a summary judgment motion was filed, how often a partial summary judgment effort was mustered and other resource and strategy facts.

Savvy litigators have mined lawsuit data for years to assess opposing counsel, guess at judges' temperaments and hunt for expert witnesses' prior pronouncements for possible challenge fodder. But why should private practice courthouse mavens have all the fun of gleaning more ammo for their guns from lawsuit information?

Moreover, law firms' contracts sometimes can be culled from other, non-courthouse warehouses for analysis and comparison when confronting your likely litigator's proposed services agreement. For example, publicly traded corporations intermittently file high stakes contingency contracts with the US Securities and Exchange Commission per those companies' ongoing disclosure obligations to shareholders.

After action reviews, which are performed after concluding litigation, determine what can be done better (process or procedural lessons learned) and how to avoid the situation in the first place (substantive lessons learned), are key components of a holistic approach to litigation.

Closing the circle allows learning from situations and processes to avoid repeating the past. A hardwired matter management system, with its ability to require after action reviews before a matter can be closed, helps ensure that formal and critical after action reviews actually occur. This organizational discipline ultimately enhances and promotes the core value of sustainable, continuous improvement in litigation management.

## Better litigation budgeting by mining your historical litigation data and reimbursement awards in others' suits

What's "waste" in the lawsuit context? How can you know if your litigators go too far in their staffing, preparation and tasks? When a lawsuit is issued, your litigation counsel, opposing counsel or both are new and unknown to you or your boss. So how can you calculate (or, more often, just estimate) project costs with any confidence? Are your team's pro forma lawsuit budgets wild guesses or predicated on available real data?

Preparation trumps imagination or inspiration. Your advance accounting aspirations are actionable before the battle begins.

You didn't know that your blue-chip multicity law firm would charge big bucks for the project administration services of its non-attorney case manager? Did you wish you knew that some judges look for geographically remote video depositions rather than traditional on-site depos (at least for tertiary witnesses or issues)? Will your jurisdiction balk at greenlighting color (rather than just black-and-white) copying costs?

Billing rates, comparable levels of effort in motion practice and other litigating financial data await. At least in US federal courts, after any initial award to a lawsuit winner of attorneys' fees (for either an interim motion ruling or an entire case), judges routinely require that the winning party document the extent of its efforts before blessing the requested amount of reimbursement. Those winning lawyers (and time-billing paralegals and case managers) specify their rates, daily efforts and resulting burn (cost) in courthouse filings, which often aren't sealed or redacted. So actual litigation-budgeting artifacts abound in easily downloaded PACER filings. Leverage other people's money to manage your own organization's cash.

Controlling expenses and predictability of expenses are near and dear to most in-house financial controllers. As it relates to litigation, the concern should be the total cost of handling a piece of litigation, not the rates charged. Thus, enormous priority must be placed on matter budgeting.

A good matter management system can arm you in those budget discussions with outside counsel. Moreover, having robust, historical litigation data will put you in the driver's seat from a budget anchoring position, as your data will arguably be more reliable than the law firm data.

## Getting *globalized*

Do you work where there's less litigation — for example, outside the United States? You can still muster US pleadings to plead your case for preventive law, careful choice of law (and arbitration and other) contract provisions and better budgeting for the legal department.

## Do better transactional due diligence through litigation checking

Is your new likely customer or corporate business partner a litigation recidivist? Don't merely do a standard credit history check, using a third party service, before entering new contracts (e.g., the traditional Dun & Bradstreet data check). At least for larger deals, also hunker down in the other side's court history, particularly in their headquarter city courts, in order to spot and avoid easily-detected evidence of high incidences of post-dealings disputes.

## Reaping better respect and broader roles

Ever detected client suspicion that outside counsel are better brains because they're apparently

more expensive? Got a CEO who golfs with your law firm's senior partner, leaving doubt for legal about where your senior executives get their guidance for dispute decisions? Want legal to be a new lawsuit's true co-navigator, not just customer?

Litigation materials can be your friend by creating more credibility for the contributions of in-house counsel to litigations.

Those companies that consistently co-staff actual lawsuit teams with full-time employee litigators are evidenced in PACER filings (Hello, Oracle Corp.).

And occasional rulings reveal that staff attorneys — not outside litigators — were the bright lights who resolved the riddle of some particular wrongdoing as a result of their better knowledge of a company's business. (One federal judge has noted that it was only in-house counsel's logic that enabled the correct direction of investigation to find intellectual-property infringement by misappropriation access at a common customer.[1])

(And there's that $250,000 bonus given to the general counsel "in recognition of reduced outside legal fees and successful results" in important litigation, as disclosed in the US SEC EDGAR database.[2])

Leaving litigation as a merely involuntary, limited, tradition-bound activity means leaving untapped a truly useful tool for in-house lawyering.

Here's hoping your deploying the output of the woes of others' litigating leads to better client legal health, legal department scope and budgeting and individual lawyer careers.

1 "… It was only a matter of luck that BMC Software's general counsel happened to inquire of Texaco, Inc. if Texaco had the requisite security procedures in place to protect BMC's Copy Plus program from access by others. Texaco then launched an investigation that revealed what CDB had done. Texaco then confronted CDB. …" (Par. 2.5.3., Findings of Fact and Conclusions of Law, 3/22/96, B*MC Software v. CDB Software Inc.*, USDC SD TX (##: 4:93-cv-00572).

2 Disclosed at www.sec.gov/Archives/edgar/data/792723/0000891618-95-000602.txt , from www.sec.gov/Archives/edgar/data/792723/0000891618-95-000602-index.html. The litigation is summarized in "Legal Proceedings" at www.sec.gov/Archives/edgar/data/792723/0000891618-96-001967.txt.

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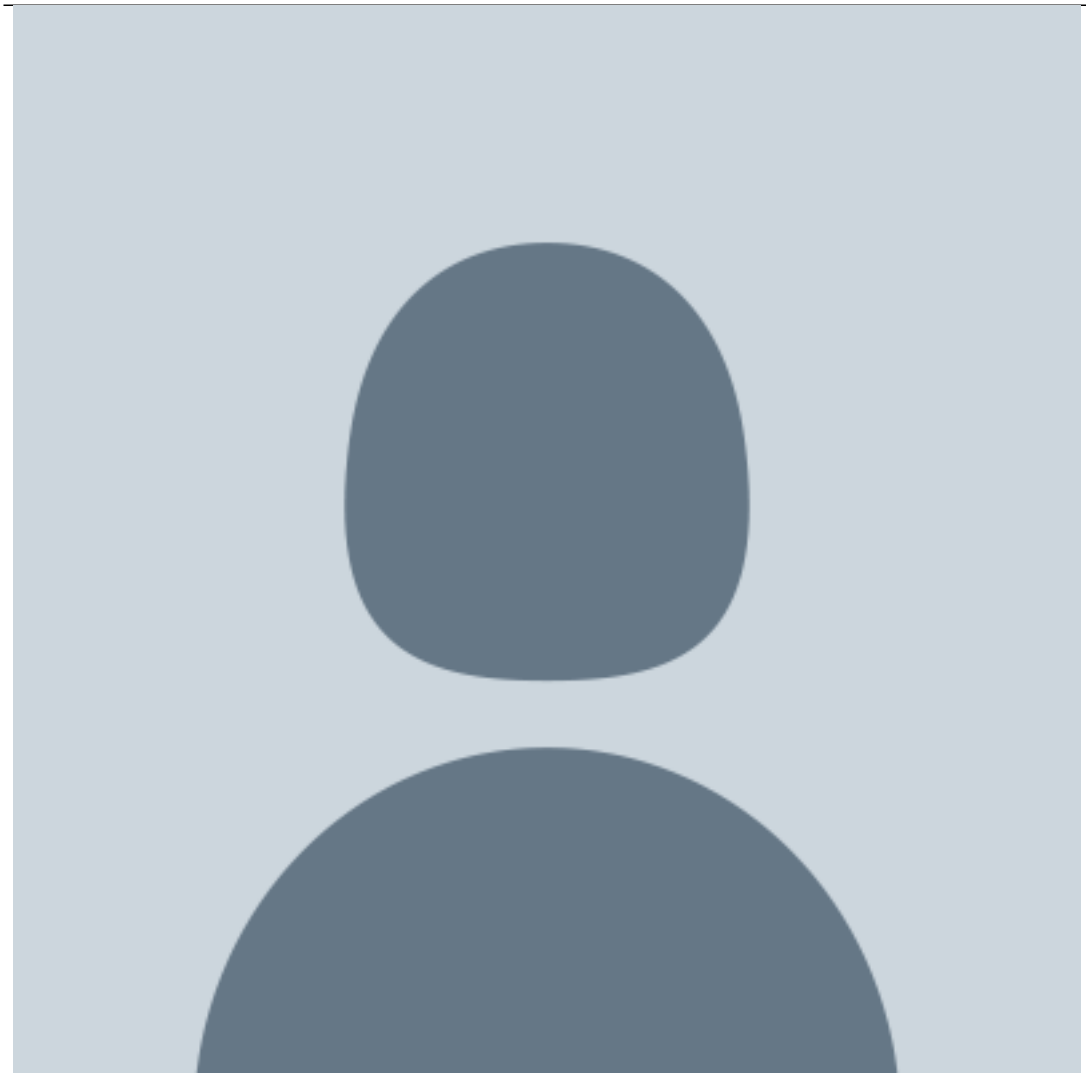

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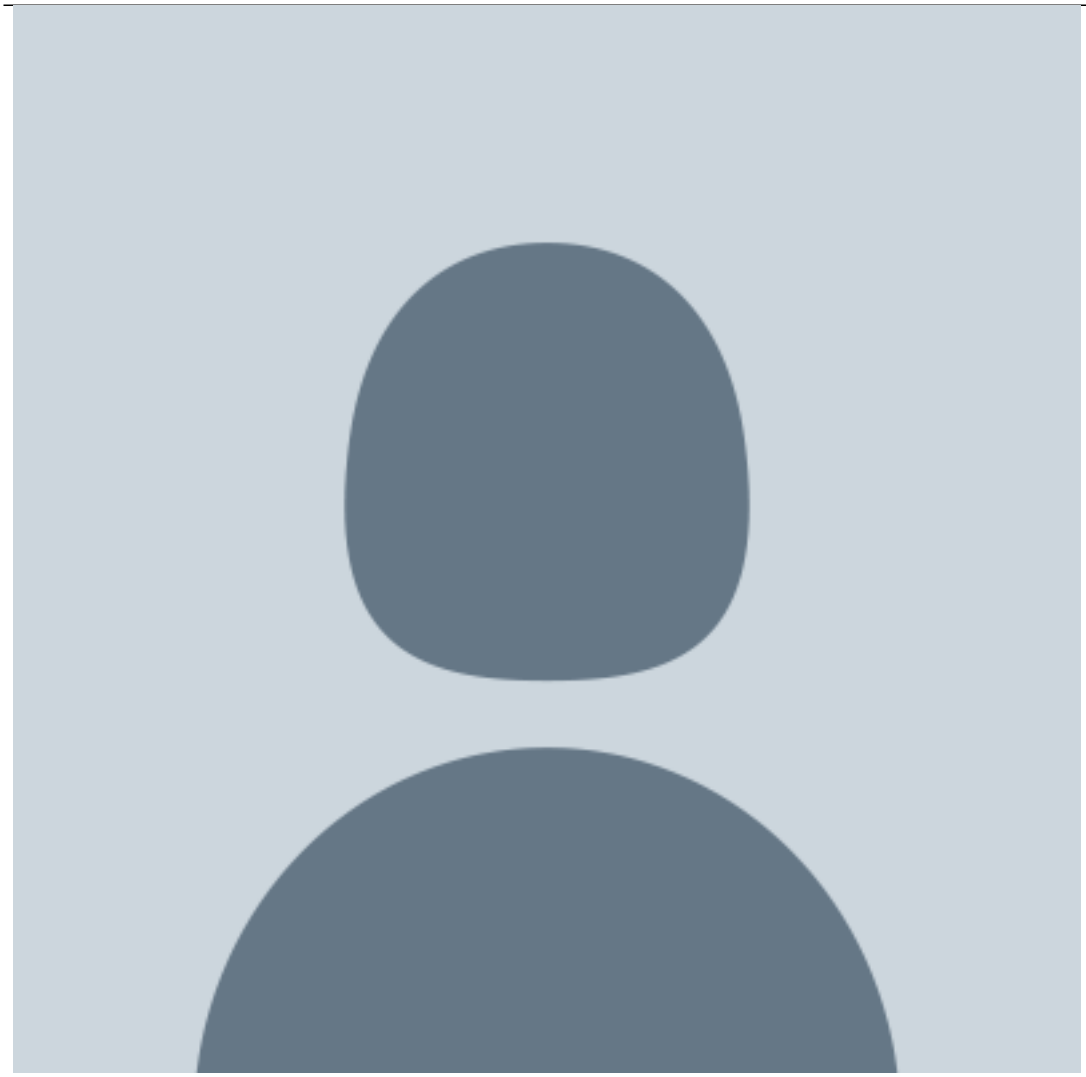

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He formerly served as head in-house counsel of two global publicly traded technology vendors, and as VP, IP development for a third. For 37 years, he’s focused on IT issues, including transactions, risk mitigation, disputes, and corporate training.