

LITIGATION RISK MANAGEMENT: STRATEGIC THINKING FOR MISSION SUCCESS

A Win Before Trial Working Paper¹

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This is a working paper in progress. This version was completed on February 3, 2012.

Further information and resources as well as online courses on litigation risk management are available at the Win Before Trial website: www.winbeforetrial.com.

Note: The research collected in this paper is extensive but surely not exhaustive. If you are aware of studies on the topic not mentioned here, please share that information with the author at mike@winbeforetrial.com. Thanks.

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LITIGATION RISK MANAGEMENT: STRATEGIC THINKING FOR MISSION SUCCESS

"As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death," wrote Judge Learned Hand more than 85 years ago.² We seem to have gone from trial by ordeal in the 12th Century to the ordeal of trial in the 21st. Not much progress, some would say. And yet, Bill McGowan used antitrust suits and administrative actions against AT&T to bring MCI to life. Litigation can be both a sword and a shield.

Litigation is as much a part of business as annual reports and tax returns. The question for corporate leaders and managers is not whether lawsuits will occur but whether the risk of litigation and the lawsuits themselves will be well managed. This article contains some thoughts on how to achieve that goal.

Synopsis:

Litigation risk management has two poles:

- Litigation prevention
- Cost-effective resolution of lawsuits

The development of good metrics and analytics is a key aspect of the strategies for achieving both objectives.

Litigation Risk *Measurement*

Quick, what are the total litigation costs to businesses in the United States? Nobody knows. It's a good bet that no one in your corporation knows the total cost of litigation to the corporation either. How can I be so confident? Because it is rare that anyone asks the right questions, much less collects the data with which to answer those

² Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter," 3 *Lectures On Legal Topics* 89, 105 (1926).

questions. Sure, the general counsel's office knows how much the corporation spends to hire outside counsel and to pay other litigation expenses. But the damage awards come out of the earnings of the various departments and divisions; and those are tracked separately. And legal fees and damage awards are only the most obvious types of litigation-related costs. No one I know measures the costs of damage to brand and reputation, reduced employee morale, diversion of executive time, lost opportunity costs, or damaged relationships – all directly caused or affected by litigation. And only insurance companies appear to keep track of settlement offers and agreements as well as trial outcomes.

“Deciding how to measure success is as important as figuring out the strategies for achieving success.”
Mark Graham Brown, *Beyond the Balanced Scorecard* xiii

In books on business intelligence³ and in the work of major GRC consulting firms, the word “litigation” is seldom found. Yet, one observer estimates that the total cost of litigation to Fortune 500 companies is equal to one-third of their profits.⁴ This is a large number. Does it not make sense to know more about how it gets to be so big and what might be done to reduce it?

³ See, e.g., Mark Graham Brown, *Beyond the Balanced Scorecard: Improving Business Intelligence with Analytics* (New York: Productivity Press, 2007); Thomas H. Davenport and Jeanne G. Harris, *Competing on Analytics: The New Science of Winning* (Boston: Harvard Business School Press, 2007); Jeffrey Pfeffer and Robert I. Sutton, *Hard Facts, Dangerous Half-Truths & Total Nonsense: Profiting from Evidence-Based Management* (Boston: Harvard Business School Press, 2006). A search for the words “litigation” or “lawsuit” in Bernard Marr’s recent book, *The Intelligent Company: Five Steps to Success with Evidence-Based Management* (New York: Wiley, 2010), likewise turns up zero hits.

⁴ John B. Henry, “Fortune 500: The Total Cost of Litigation Estimated at One-Third of Profits,” *The Metropolitan Corporate Counsel* 28 (Feb. 2008).

Properly developed litigation risk management techniques and procedures would focus on the enterprise as a whole – viewing the company as an integrated system and adopting strategies to lower the risk of getting sued. And litigation risk management would include strategies for reducing the total cost of actual lawsuits. Success in litigation risk management, therefore, means preventing the preventable and achieving optimal results when prevention fails.

Thus, the phrase “litigation risk management” as used here has two distinct meanings. The first refers to the risks *of* litigation at the *enterprise* level. The second concerns the risks *in* litigation inherent in individual cases, which I address later in this article. Measurement is a key – but by no means the sole – aspect of effective management in both instances.

All management at the enterprise level requires measurement. But what are the appropriate metrics? The number of lawsuits? The dollar cost of defending or prosecuting claims? The amount of time executives spend dealing with depositions, court appearances, meetings with lawyers, and other litigation-related matters? Yes – and more. The first task, therefore, is to determine what it is we seek to measure.

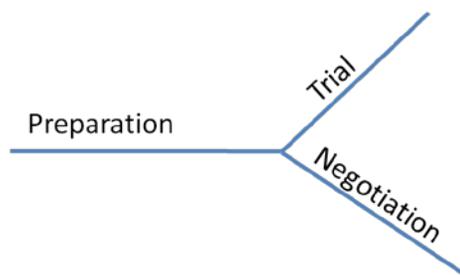
Embedded in the first task is a second: Determining why we want to capture the particular data we have in mind. What benefit will it give us? In what ways will we be better able to achieve the corporation’s mission by having this information? What do we plan to do with it once we have it? What *can* we do with it?

The third complex of questions quickly follows: How are we going to get the data we want? How are we going to preserve and maintain it? How are we going to make effective use of it?

Finally, we need to know who in the organization is going to do all this work. Who should be responsible for leading the effort? Who needs to contribute? Should this function be part of a department or spread among several? Stated differently, should it occur within one silo with a command center or be diffused?⁵

What Litigation Looks Like

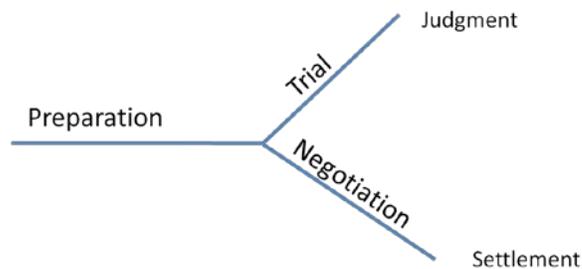
The bulk of the time and effort in litigation is spent preparing the case. At some point, the parties engage in settlement negotiations, perhaps with the help of a mediator, in an effort to resolve the dispute. If they do not reach agreement, they proceed to trial. Thus, the litigation process looks like this:



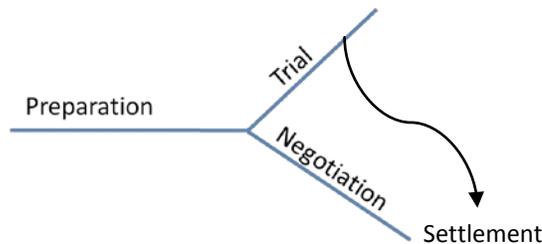
The trial path culminates in a verdict, which eventually becomes a final judgment. (There may be post-trial motions, an appeal, a re-trial, a second appeal, another re-trial, and so on. Cases can drag on for years, even decades. Most do not.) The

⁵ How to minimize Leakage and waste? *See* Ajish Gopan, “Integrated Claims Analytics and Problem-Solving Scorecards,” Insurance Information Institute (2008).

negotiation path leads to a settlement agreement.



Parties can switch from the trial path to settlement at any point in the process, even after a verdict or appeal:



Litigation Strategy

Strategy is about defining goals and choosing the means—a course of action—for achieving them. Goals are a function of interests. Means are a function of fitness and constraints. In other words, the goals should be determined following an analysis of the needs, desires, must haves, and must avoids of the corporation in light of what is possible. What is possible is governed by cost and time constraints and by the activity of the adversary, whose strategy is (or appears to be) antithetical to yours.

“Even the greatest of all strategists must take into account that there is an enemy and that they have their plans too.”

Colin Powell

Litigation strategy is different from business strategy generally in that there is a direct adversary – someone who is trying to achieve their goals at your expense, not in side-by-side competition, but in head-to-head combat. Like a military general, the litigation strategist must think through everything twice, once from her perspective and then from that of the other side. It's analogous to a chess game or football, except that such games are much simpler.

The role of the managers in devising litigation strategy is to define the corporation's interests as they relate to the lawsuit and to determine bearable costs (money, impact on executive time and other company resources, impact on reputation, etc.). The manager must work with the lawyers to define goals, constrain costs, minimize exposure when defending a case, and maximize recovery when in the role of the plaintiff.

The role of the lawyers is to estimate what can be achieved in the case and what the likely financial costs will be. What can be achieved is a function of the law, the evidence, the expected actions of the adversary, and the judgments of third parties (judges and juries). That is the lawyer's job. Together the managers and lawyers set goals that reflect the interests, cost constraints, and what is achievable given the law, the evidence, and likely decisions by the judge and the jury.

At least that is how the development of a litigation strategy *should* work. Too often, however, managers get the case off their plate by delegating everything to the lawyers. Or the lawyers keep the managers in the dark or fail to give them adequate cost estimates or cannot estimate the likely outcome of the case. In many cases, the

lawyers just keep sending bills for mounting litigation fees and expenses, seemingly with no end in sight; and the managers get involved only when called upon to give a deposition or to testify at trial.

Generally speaking then, the reality is that managers and lawyers do a poor job of devising litigation strategies that properly reflect the interests of the company, including the need to balance litigation costs against litigation benefits. We can do better. But to make improvements in this process, managers need to be well informed and proactive.

Avoiding Litigation

The job of avoiding litigation--both civil and criminal--is actually more involved and more challenging than that of managing it once it arrives. For there are hundreds of ways that corporations can become the objects of lawsuits. That said, the strategies for avoiding lawsuits are themselves simple and straightforward. They boil down to one rule: Make sure the company and its employees do the right thing.

Since the enactment of Sarbanes-Oxley, managers of public corporations have had to focus part of their attention on Governance, Risk Management, and Compliance, popularly called GRC. Much of this effort is old-fashioned prevention of lawsuits by adopting policies and procedures designed to assure compliance with the law and morality.

Good corporate governance is a primary means of achieving the strategic goal of assuring that the company does the right thing. Good governance fosters a culture of

respect in the workplace and policies and practices that support legal compliance and moral responsibility. It starts with the right attitude, namely the conviction that the purpose of the company is to achieve its mission. As David Packard put it, “Profit is not the proper end and aim of management – it is what makes all of the proper ends and aims possible.”⁶ This is fundamental. Get this part wrong and all manner of evils flourish no matter how many rules, policies, and ethics programs are put in place. If the real message is “Do what it takes to make the numbers, regardless,” then people will literally do what it takes, and lawsuits, possibly including criminal indictments, will inevitably follow.

A key feature of lawsuit avoidance, therefore, is a culture of respect and integrity, promoted and solidified by a well-written code of conduct that is the basis for training, monitoring, and enforcement of proper employee behavior, including decisions made on behalf of the corporation itself. A good ethics program can help prevent a significant amount of harassment, theft, intimidation, discrimination, fraud, bribery, extortion, and other misconduct.⁷ Such an ethics program will also help build ethical competence, the ability to make the right decisions when faced with conflicts among the legitimate interests of the company’s stakeholders. The integration of diversity training into the structure of the company can also help build a company of inclusion in which each individual’s special qualities and background form the basis of

⁶ David Packard, “A Management Code of Ethics,” speech presented to the American Management Association, San Francisco, CA, January 24, 1958, *quoted* in James C. Collins and Jerry I. Porras, *Built to Last: Successful Habits of Visionary Companies* 56 (New York: Collins Business, 1994).

⁷ Fulbright & Jaworski’s 6th Annual Litigation Trends reports that 40% of all litigation against corporations involves personnel-related claims.

contributions to the firm's success rather than occasions for disrespect, dissension, and, eventually, litigation.

Similarly, a well-designed alternative dispute resolution program can help managers keep conflicts and other problems from becoming lawsuits. Mediation, restorative justice, early intervention in conflicts, and manager competence in conflict resolution are means with which to keep brush fires from becoming conflagrations that engulf the company in costly litigation.

The old saying about an ounce of prevention applies in the litigation risk management context too. But sometimes a pound of cure is necessary because some lawsuits are unavoidable, either because our company must bring suit against another to right a wrong or because we have been sued.

Management By Measurement

These general strategies are likely to reduce the occasion for litigation, but without a system of keeping score, we cannot know which strategies are most effective and which have little or no effect at all. Although a full-blown method of tracking and measuring the relevant parameters would be the subject of an entire book, a few suggestions can be made here:

1. Work with the firm's in-house and outside counsel to identify the potential types of liability that might lead to lawsuits against the company.
2. Determine the frequency with which lawsuits for each type of liability are brought against companies in this industry.
3. Work with the company's insurance carrier to identify risk factors for each type of liability.
4. For each type of liability, work with the firm's in-house and outside counsel

- to understand the legal bases of liability, to learn what kinds of evidence typically leads to significant damage awards, and to establish preventive practices.
5. Identify the categories of information most likely to provide the most valuable business intelligence related to the litigation risks (e.g., internal grievances and claims, external complaints, lawsuits filed, lawsuits settled by agreement, lawsuits resolved by final judgment, quality control procedures, ethics training, policies in place, etc.).⁸
 6. Identify the categories of information relating to programs designed to prevent claims (e.g., internal dispute resolution programs, ethics hotlines, ethics training, product design safety review, product quality control, response systems for customer complaints, hiring processes, and the like).
 7. Collect the existing data available in the various categories and sub-categories.
 8. Devise a system for capturing the relevant data going forward.
 9. Develop analytical procedures and software that allow managers to discover correlations between prevention strategies and the occurrence and cost of litigation.
 10. Use appropriate software to create status reports (e.g., SAS Business Intelligence, Oracle Business Intelligence, Actuate's BIRT Performance Management Software or other BI software program).
 11. Conduct periodic reviews of possible changes that might reduce litigation risk.
 12. Establish a database of information on
 - a. lawsuits filed against the company (the claims, costs, and outcomes),
 - b. steps taken following lawsuits to prevent their re-occurrence,
 - c. lawsuits filed in the industry, and
 - d. litigation trends.

⁸ Each major category would have several subcategories for collecting data that would enable managers to drill down to find out where specific problems are occurring. For example, the system should contain subcategories such as the following: number of grievances asserted, overall number of claims made, number of claims resolved without litigation, number of claims resulting in lawsuits, number of lawsuits resolved by settlement, number of lawsuits resolved by final judgment, dollar amounts of claims, dollar amounts of settlement offers/demands, dollar amounts of settlements paid/received, dollar amounts of final judgments paid/collected, categories of claims (personnel-related, product-related, internal, external), legal fees incurred, out-of-pocket expenses, executive time diverted, and so on.

This last step is the foundation for creating business intelligence around litigation and the risk of litigation.⁹

It is probably best to start a litigation risk management program with baby steps, trying at first simply to gather information about some major data points (e.g., how much do we spend in each department on litigation?). A full-blown LRM effort may require the development of metrics and analytics that have so far not occurred to anyone in the organization. For example, very few corporations have a system for measuring ethics.¹⁰ But the failure to develop one deprives managers of importance business intelligence.

Winning Settlements

Once a lawsuit is filed – whether your company is the plaintiff or defendant – the object is to win. If the case actually reaches a verdict after trial, winning means defeating the other side, getting a ruling in your favor on the matter under dispute. But prevailing in a lawsuit after a trial often means losing at the same time. A winning defendant still pays legal fees, loses executive time and energy, and suffers damage to other interests, all of which can greatly exceed a reasonable settlement amount. And a winning plaintiff must deduct its costs from the jury award, thereby netting less as well. This lose/lose aspect of trials is the principal reason that over 95% of all lawsuits are settled by agreement before a judge or jury renders a verdict.

⁹ See Thomas H. Davenport, *Competing on Analytics: The New Science of Winning* (Cambridge: Harvard Business School Press, 2007).

¹⁰ Mark Brown writes, “I have not encountered a single major corporation or government organization that has an ethics metric on its scorecard.” *Beyond The Balanced Scorecard* at 9.

Winning the settlement means something entirely different from winning the trial. Here the object is not to defeat the other side but to obtain a result that is, on balance, better than the likely net result of a trial. How is that possible? It happens for three reasons. First, a negotiated settlement offers both parties the opportunity to be financially better off than either would be after trial. The plaintiff's net recovery is the damage award *minus* whatever legal fees and other costs she pays to get the verdict. The defendant's net cost, on the other hand, is that same damage award *plus* its litigation costs. If both parties estimate the likely damage award to be roughly the same, a zone of possible agreement (ZOPA) will emerge in which the amount necessary for the plaintiff to be financially better off than going to trial will be less than the amount the defendant could pay and still be better off as well. In other words, the defendant can pay more to settle the case than its total exposure at trial, and the plaintiff can accept less than the likely verdict because, by settling, it will avoid the costs of continued litigation.

Second, in a voluntary settlement parties can satisfy each other's interests in ways that no court could ever order. Many sexual harassment cases have been settled at lower cost than otherwise when an officer of the company apologized during the mediation process for the illegal behavior of an employee. A defendant's apology can be very important to the emotional well being of a plaintiff; but no court can order it. A major engine of settlement is the recognition during the negotiation process that each party can satisfy important interests of the other at low or no cost to itself. For example, in one garden-variety collection case, the plaintiff learned in mediation that the

defendant would need to pay significantly more to purchase cans from the plaintiff's competitor and could pay off the disputed amount by purchasing a set quantity of cans from the plaintiff at a rate below the competitor's rate but above the plaintiff's standard rate, thus allowing the plaintiff to get paid the disputed amount while the defendant was better off as well. As Garrison Keilor once said, "Any two people can become friends if they discover how they need each other."

Third, there is much to be said for certainty. Some parties have a low tolerance for risk and a corresponding high need for a known outcome, even one that is substantially worse than what they might hope for. Like wars, football games, and election campaigns, trials are filled with the unexpected and unpredictable. Well prepared lawyers know perhaps 80% of what will happen at trial. But they are plagued by the known unknowns and unknown unknowns that constitute the balance of what goes on. A negotiated settlement offers the parties the chance to translate all that risk into certainty, to purchase/sell an indemnity contract with a single premium.

In short, winning trials is about surviving and prevailing in combat. Winning settlements is about satisfying financial and other interests. It is the job of the responsible manager to articulate the company's interests as they relate to the litigation and to communicate those interests clearly to in-house and outside counsel working on the case.

How can we tell which path – trial or settlement – better satisfies the company's interests? To answer that question, we must answer the following four questions:

1. What is the full package of the company's interests as they relate to this lawsuit (direct expenses, executive time and focus, intangible interests, etc.)?
2. How much will it cost in legal fees and other direct litigation expenses to see the case through to final judgment?
3. What is the percentage likelihood that the jury will find the defendant liable to the plaintiff?
4. If the jury finds for the plaintiff, what is the likely amount of damages they will award?

Each of these questions has several sub-parts and there are other questions that must be answered as well. But these four are the main questions. If the manager is confident that she has good answers to these questions, she can make an informed judgment about whether a proposed settlement satisfies the company's better than trial.

While the lawyer is the primary source of information needed to answer questions 2-4, the manager must supply the answers to question 1 – the company's interests. It is critical, therefore, that the manager and the lawyer work closely together in defining settlement goals. And this cooperation must continue throughout the litigation because interests change as do the remaining costs and the likely outcomes of contingent decisions. Even though the manager is the primary source of information about the company's interests, the lawyer should be involved in the definition of them because she knows how the lawsuit is likely to affect them and has the experience to elicit information about interests that the manager might not see. Similarly, the manager should engage in dialogue with the lawyer about the costs and likely outcomes of contingent decisions both because she can ask probing questions (is that motion for summary judgment cost-effective?) and because her involvement better enables her to

make decisions about whether to settle or continue on the path to final judgment.

Again With the Measurement?

As with litigation prevention strategies, litigation management requires good metrics, data collection, and data analysis. The company needs to identify key categories, the status of which will help managers develop strategies for reducing the cost of litigation when it occurs. These might include some obvious and not-so-obvious categories of data:

1. Fees paid to outside counsel to represent the company (by firm and by lead counsel)
2. Out-of-pocket expenses
3. Litigation budgets and actual direct litigation costs
4. Time spent by in-house counsel managing litigation
5. Different categories of lawsuits (personnel, product-related, etc.)
6. Damage to reputation and brand strength
7. Time spent by executives and others responding to discovery requests, preparing for testimony, discussing strategy with lawyers
8. The estimated Net Present Expected Financial Value¹¹ of the case compared with actual outcomes
9. Settlement offers made/received compared with settlement agreements made/received
10. Final judgments in favor of the company
11. Final judgments against the company

Again, an appropriate litigation management system would include systems for

¹¹ Preparing reasoned estimates of the Net Present Expected Financial Value of the lawsuit requires an analytical process such as the one I lay out in *Winning Settlements: What Courtroom Lawyers Must Know to Get the Best Deals for Their Clients* (forthcoming).

gathering, analyzing, and reporting all of the data.

The Board's Role

The board and senior officers have the responsibility to assure that litigation avoidance and litigation management policies and procedures are in place as part of the GRC program.

The best way to manage litigation is not to get into it in the first place. Senior management's first obligation, therefore, is to think strategically about avoiding toxic cultures and other conditions that breed lawsuits. It is becoming increasingly evident that companies that do the right thing have fewer lawsuits and, accordingly, lower litigation costs and damage awards. And they pay significantly less in insurance premiums – at least for D & O coverage.¹²

Conflict Management and Alternative Dispute Resolution

Finally, every litigation risk management strategy should include an in-house conflict management and alternative dispute resolution (ADR) program for the resolution of disputes with stakeholders (including employees) and outside entities. Following the publication of the seminal book *Getting To Yes: Negotiating Agreement Without Giving In*, integrative negotiation and conflict management tools and techniques developed over the past 30 years now provide corporations with a core technology for

¹² See Tom Baker and Sean J. Griffith, "Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market," 74 U. Chi. L. Rev. 487, 487 (2007) ("worse-governed firms to pay higher D&O premiums than better-governed firms").

preventing and resolving claims without going to court. Members of the CPR Institute¹³ have taken advantage of this resource; other corporations could achieve similar benefits.

Integrative negotiation is not *merely* a method for resolving problems once they have arisen or even for preventing them. Its higher and better use is to create a corporation in which every manager has the skills and the disposition to negotiate in ways that solidify lasting relationships for mutual benefit between the firm and its various stakeholders. Properly implemented, an interest-based negotiation and ADR program involves the commitment of senior management to its principles and the training of all managers. Such programs translate vague ideals of cooperation into powerful skills that increase the corporation's ability to achieve its mission at less cost and greater profitability.



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For more information, visit our website, www.WinBeoreTrial.com, call 802 870 3450, or write mike@winbeforetrial.com.

¹³ [CPR Institute](#): International Institute for Conflict Prevention and Resolution, 575 Lexington Avenue, 21st Floor New York, NY 10022

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