



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

LITIGATION MANAGEMENT

A Solo Practitioner's Perspective

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The small law department, and in particular, the one lawyer law department is the last holdout of the generalist. We have to handle whatever comes up, using some outside resources, sparingly, if possible. Many of us created a law department from scratch, with the idea that the company could get better service for less money than it had been spending on outside counsel. Litigation, however, is the one area where outside help is almost always needed. It then becomes our job to at least keep an eye on it, and hopefully bring some management to it so as to make sure the company's interests, are represented.

In order to get the company thinking of its own interests in the right light, there is a need to manage the litigation process inside the company. Those key decision makers who need to be kept informed, and will have the responsibility to make the final, "fight or settle" decisions, need to know how the process works.

As much as some of our business colleagues would like to just turn the problems over to "Legal", it is very hard to do this without a lot of help and cooperation from the rest of the company. When you only have one lawyer, or even two, you could get bogged down with one case, and not accomplish some of your other goals. Even the small, but annoying case needs some input from operations. After all, it was theirs before it was ours.

One way to handle things is to break it down into various components. The following analysis is couched more in terms of a defense posture. Most of the same issues apply if you are considering suing another party. Maybe you have a little more time to look at it, but don't count on it.

Initial Information Gathering. Very seldom will a Complaint spell out enough details of a claim to make a good evaluation.

- Analyze the complaint, or the claim your people wish to make. However, since pleadings today seem to be as vague as possible, and often devoid of facts, maybe you will get some dates, you need to get whatever you can from it and move on.
- Consider calling the lawyer who filed the Complaint to try to get an idea what it is about.
- Get the facts from company people and documents.
- Examine the need for some investigation and discovery to evaluate the claim. This will have to be explained to the manager who just wants it to go away because "we didn't do anything wrong".
- Determine if you will need to get significant discovery from the other side to support your position. Again, the complaint is often so devoid of details, that you can do little to evaluate the claim from the complaint itself.

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- Get all the facts, not just the good ones.
- Estimate "best" and "worst" cases.
- Estimate reasonable expectations for outcomes.
- Define what "winning" means.
 - Only a defendant's verdict will do?
 - Reasonable settlement, with costs under control
 - Anything that keeps the company afloat is a win?
- Are there equitable remedies involved, or is this just a claim for money damages?
- Can attorney's fees be recovered?
 - Can either side recover fees?
 - Is only a successful plaintiff involved?
- Any exemplary damages?
 - Punitive damages?
 - Enhanced (e.g. triple damages) recovery under some statute?
- What is the time cost of money?
 - Who is holding the money?
 - Who has the time cost risk?
- What is the cost to pursue the fight?
 - What kind of representation do you need?
 - How much can be done in house?
- What other factors are involved?

Consider the Other Factors and the Non Cash Costs. It is more than just the legal fees and possible judgement that needs to be considered.

- Customer relations.
 - Are there any? Do the business people really want to fight with that customer?
 - What are they worth? Can you enhance that relationship by taking a proactive approach?
- Counterclaims on other issues.
 - Do you have any to impact the balance of bargaining power?
 - Assume if you sue someone, they will look for the counterclaim. Any skeletons in the closet?
- How much time will be spent by the people who get paid a lot to do more productive things?
 - What message do you want or need to send?
 - Should it be millions for defense, but not a penny for tribute?
 - Lets discuss a reasonable solution?

- If you sue us, we will pay you to go away?
- Is work or product rather than cash a viable option?
- If its broke, just fix it?
- Future discounts?
- Maybe they just want some attention, and an apology.
- Are people making business or personal decisions in their dealings with the claim?
- Get the manager with the axe to grind, or rear end to cover, out of the front of the line. You will need that person for information, but they may not be the best for evaluation.
- Kick it up a notch if needed.
 - Sometimes just getting the next step higher involved can lead to a quick settlement.
- Maybe another department can take over.
- Are other parties necessary to a complete resolution?
- Should someone be third partied into the case?
- If you are a third party, can you make a separate deal?
- Consider business approaches, particularly if a lawsuit has not yet been filed.
- Suggest that the business people talk to each other. They have some common ground complaining about the lawyers.
- Is insurance involved? Who will be calling the shots, and making the final decision?
- Use the Insurance Company as a go between, with communication, and direction. If it is really your money as in a big deductible situation, you can get their evaluation to weigh against your own, but still be able to step in to try to work something out.
- Is there a claim against a Bond or other Guarantor?

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Reporting and Involving Management. If they can't just dump it in legal, they may care more how it comes out, and be more helpful in the resolution.

- Whose problem is it really?
- What subsidiary, division, branch or department will take the hit for this one? Will the legal expenses and ultimate settlement payment hit the same bottom line? If not, The legal department may get stuck being the referee.
- Does this one need top management involvement?
 - The size of the matter itself will dictate some of this.
 - Do you need to get above the day to day conflict of whose department takes the hit?
 - Do you need a higher level to get a cooler head without the same personal involvement?
 - Do you just need a more experienced hand?
- Get authority guidelines clear as soon as possible.
 - How much authority does the Legal Department have?

- Who can make the call on demands, offers and such?
- Does an Insurance carrier have any say in the matter?
- Be ready to make recommendations.
- Who needs to be in the information loop?
- Don't compromise confidentiality just to get maximum buy in.
- Is Privilege and related confidentiality likely to be an issue?
- Certain claims (e.g. employment claims) are particularly sensitive.
- Keep the people with the final say on settlement up to date. This makes it easier to respond to settlement opportunities.

Educating Company Personnel on Litigation Issues:

- Encourage realistic expectations.
- Avoid the win/lose approach to options.
- Don't adopt policies that will not be enforced.
- Discuss outcomes and preferences early and often.

Maintaining Contact with the Case and Counsel:

- Meet face to face. This cannot be done in all cases, but if you use someone more than once, go see them. They will return your calls faster.
- Show that you care, even when insurance carrier is defending. Many insurance defense lawyers are surprised when a "real" client shows up, and welcome the chance to discuss the case with another lawyer.
- Maintain a digest of contacts and developments. You don't need expensive software. You can do it on a Word Processing, generic database, or even a calendar program.
- Try a "tickler" system or diary with automatic review dates. Then call to see if something is going on. You may be surprised how often you will hear, " was just about to call you."
- Be a squeaky wheel. This keeps your files on the top of the stack.
- Discuss strategy. Look for ways to keep the costs under control, by discussing what really needs to be done.
- Discuss outcomes, and preferences early and often. You need to discuss it with management, so get outside counsel input.

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Settlement Decisions:

- Get evaluations.

Counsel, Experts, Insurance Carrier.

Add your own experience.

- Make a recommendation on authority for the person negotiating.
- Who Attends Mediation:
- Make sure the person has adequate authority.
 - Nothing frustrates the process more than the representative who has to keep running to the phone.
 - Send someone who has been given discretion, and choose one with the good sense to use it.
 - Authority to settle does not have to be authority to capitulate. The representative should have some understanding of the strengths and weaknesses of the case.
- Person's Position should be commensurate with the claim. The Claim Manager may be high enough for the slip and fall, but a dispute with a major customer or supplier calls for someone in a different capacity.
- The in house lawyer may not be the best person to attend, at least not alone. In business disputes, settlements are probably more likely where the representatives can talk to each other on the same level.
- Can you just be on phone standby? In some cases it may be more practical to have the outside lawyer attend with only a local representative, keeping someone in the home office on phone standby. Make sure you are available.

Preventive Training -- Design a Lawsuit Repellant Program:

- Use litigation experience in training programs.
- Nothing teaches like experience.
- The war stories make it real.
- Put it in a business perspective.
- Discuss why people sue you.
 - Lack of communication
 - Misunderstood expectations
 - Bad or No documentation

- Bad or No documentation
- Customers who get unwelcome surprises
- Etc. Use the examples that fit your business.
- Keep it simple, and in non-legal language. This isn't law school. You are there to help them make better business decisions, not make lawyers out of them.
- Offer programs for lower levels than many think you should. Anyone who:
 - Deals with Customers,
 - Handles or generates key documentation,
 - Gathers sensitive or important information,
 - Is out there representing your company,

Needs to know how their actions have legal implications, or affect the company's ability to resolve disputes.

- Leave them with something tangible. Produce books, guidelines, checklists, with useful easy to take steps that will help the process. When you want people to do the right things, make it easier for them to do it.
- Try to leave them with a new good idea. Anytime someone comes up after a session and says, hey, I never thought about it that way before, you have made progress.
- Once is not enough. Repackage the same information, and make the circuit again.

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