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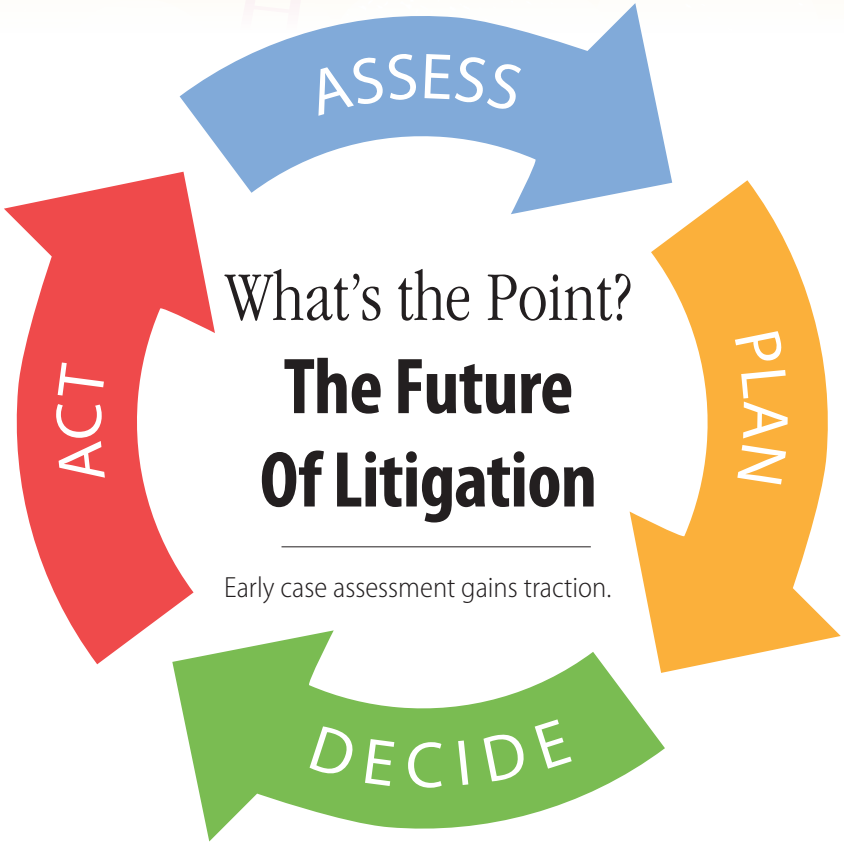

BIGSTOCK

What's the Point? The Future Of Litigation

Early case assessment gains traction.

BY SUSAN T. DWYER AND RONALD J. LEVINE

Litigation attorneys currently work within a conflict resolution system that is a losing situation for everyone involved—from claimants to defendants to attorneys (on both sides of the dispute). Everyone knows the drill: A lawsuit is filed by an attorney for a claimant; the defendant responds by hiring an attorney who prepares a pre-answer motion or files a formal answer to the complaint; issue is joined and the battle lines are drawn; an expensive and disruptive discovery phase ensues (that can typically last for years), motions are filed and arguments presented; a trial is scheduled, with costly advance preparations; on the eve of jury selection, serious negotiations ensue and the case is settled, often for an amount the defendant would have paid much earlier, or in excess of the amount which would have resolved the case much earlier, had the facts been efficiently collected and the matter treated as a business transaction rather than a heavyweight title bout. This is the prevailing pattern in the vast majority of all cases filed in this state and nationwide.

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The High Cost of Litigation

When the settlement agreement is finally reached, company counsel is, at best, resigned, and at worst, angry and disappointed. Outside counsel feel they did the best job possible to hold off the inevitable. Plaintiff and his or her counsel feel they were beaten down, forced to wait years and fight Goliaths to get what was "due" them and that they are justified in concluding that corporations are evil and greedy and will do anything money can buy to avoid taking responsibility for their actions.

Corporate counsel has less respect for, and trust in, their outside counsel and must explain to management how it could have cost so much money for the privilege of ultimately settling a case and why a reliable prediction of the result could not have been done sooner. Their outside lawyers feel they did the best they could to keep their adversaries reigned in, despite their client's dissatisfaction with the costs of the process, while their partners congratulate them for the revenue generated by the case.

Old Habits Are Hard to Break

How does such an ineffective and unsatisfactory system continue to prevail? Why do such obviously intelligent, creative people continue to follow this model case after case, year after year? The answer is simple. Old habits are hard to break.

Despite the availability of non-traditional methods of dispute resolution such as arbitration and mediation, the vast majority of disputes continue to follow the pleading-discovery-trial preparation-settlement model. And despite dissatisfaction with the billable hour model by those paying the bills, and examples of a plethora of alternative billing methods, the standard model prevails. This arrangement often rewards quantity over quality, inefficiency over efficiency, standard practice over creativity and can put outside counsel squarely in conflict with their clients.

The unpredictability of outcomes continues to fuel the model with all parties buying into the notion that the

process itself determines what the settlement amount will be—the more aggressive the defense, the smaller the settlement, and the more aggressive the prosecution of the action, the larger the settlement. Those outcomes are simply not supported by the facts. An analysis of the claims and defenses in the early stages of the process can usually predict what the settlement value is—and will be—regardless of when the parties get to that discussion.

Breaking the litigation model requires everyone to move out of his or her comfort zone. Corporate counsel will have to be willing to fairly assess and reward "value." What is it worth to the company to settle a case in six weeks versus three or four years? What does it take for an outside lawyer to make that happen? How can that performance be "rewarded" within the confines of the corporate structure? Will courts accommodate the process?

For the outside lawyer whose entire business is built on the hourly billing rate model with its easily projected budgets and profits-per-partner estimates, is value-based billing just too risky to embrace, notwithstanding the obvious client dissatisfactions with the current model? Can plaintiff's counsel be persuaded to turn over information and discuss resolution of a dispute in a business, rather than an adversarial, context? How can they trust their enemies? Why should they believe they are achieving the best results if they don't slug it out in the standard litigation process? Even if all parties and the court will agree to a process that stops or delays the normal litigation model, how can a case be analyzed in a way that all parties can agree is fair and where the predictions of how the evidence and arguments will play out can be addressed so as to avoid the need to actually go through the process?

Win-Win With Early Case Assessment

Early Case Assessment (ECA), coupled with what is known as a Decision Tree Analysis (DTA), provides a win-win mechanism for the parties in disputes for which settlement is an option to be considered or is a likely outcome. The reality is that the longer a dispute goes on, the more hardened the parties' positions become, and the more expensive the ultimate resolution is to everyone in terms of time, money and damage to relationships. Emotions, including pride, anger and greed, turn otherwise reasonable people into intractable opponents.

In its simplest definition, ECA is a process designed to obtain sufficient information in a short period of time so that a reasonable assessment of the costs and risks of the dispute can be made. The key to defining the elements of ECA is to approach the "case" as a business transaction rather than an adversarial dispute. The objective is to determine whether the company should enter into a particular business transaction (in this case, settlement), and whether it is in the company's interest to act quickly in order to maximize the benefit of this particular transaction.

The implementation of an ECA program as an alternative method of resolving claims and disputes is available and can be adapted for use in any company, whether the docket involves one case or hundreds. Likewise, this type of analysis is useful for any litigant in any dispute. It recognizes the reality of the cost and risk of litigation and presents a long overdue method to achieve rapid, reasonable resolution of disputes.

Unless a case is one that the party would not settle under any circumstances and must be tried to verdict and/or ultimate decision after appeal, the matter should be immediately assessed for potential early resolution. The adversary should be approached, most effectively in a face-to-face meeting in a neutral setting, to set the tone of civility and to discuss the potential for an agreement to stay the proceedings. This will give the parties time to assess the claims and defenses and value the case. This is a crucial juncture as it is imperative that the parties' counsel establish a working relationship at the outset. The objective is to enter into a simple agreement for the exchange of information on a set timetable and to stay the proceedings during that time. The parties need to agree on what information is absolutely essential in support of, and in defense of, the claims asserted.

All information, discussions, documents and offers, if any, must be expressly agreed to remain confidential, although any evidence exchanged, which is otherwise admissible or discoverable, is not rendered inadmissible or non-discoverable merely because it is presented in this process. The parties must agree to prompt negotiations following the exchange of information, with or without a mediator.

Once this agreement is in place, the task of assessing the value of the case is the next step. Management will inevitably want to know your opinion on the company's exposure. An answer such as "hard to know," or "litigation is unpredictable" is not going to sit well with people charged with running a business.

Going Beyond the 'Gut' Guess

Many companies use decision tree analyses routinely to make important business decisions. Engineers use them as well. They are also used in medicine to make life and death decisions. Thus far, however, most lawyers have not taken the extra steps of mapping out the complexities of their cases using decision trees and carefully considering the probabilities of winning and losing the many issues they will face at various stages of a litigation. That said, DTA has been around for quite some time in the legal arena, having been first introduced to attorneys in the 1970s by Marc Victor of Litigation Risk Analysis, Inc.

For those who do not use DTA, the client only gets a seat-of-the-pants answer about settlement, based on a "gut" feeling from counsel about the overall case value. Indeed, many counsel are afraid to make predictions, fearing that they will suffer consequences if their view of the future is proven grossly wrong. So, when counsel is pressed for probabilities, the client often hears 50-50.

But, even 50-50 is an exercise in DTA, albeit a very simplistic one. And, with a little thought and analysis, counsel can provide a much more valuable answer than simply "the overall chance of winning is 50-50." DTA provides the attorney with an opportunity to consider the odds on each of the key underlying issues, on both liability and damages, and then to arrive at the "expected value" of a case—that is, the probability-weighted average value that corporations use to make other important business decisions.

To some extent, lawyers have always valued claims based on the strength of their liability arguments and the magnitude of damages at stake. Decisions regarding settlement involved weighing defenses and expected verdicts. However, the calculations were rarely explicitly or carefully done. DTA makes counsel's detailed thought processes transparent and ensures that the overall case value is consistent with counsel's views on each of the underlying issues.

DTA involves four steps:

1. List the potential pretrial and trial uncertainties (issues) that the judge and jury will resolve during the litigation; define the possible outcomes of each issue; and identify "what will happen next" for each outcome of each issue—capturing all this in a decision tree;

2. Estimate the probability that each outcome on each issue will occur;

3. Determine a dollar value for each of the possible paths the case may take; and

4. Calculate the overall case value by multiplying the probabilities along each path by its dollar value, and then summing all the results.

The alternate paths can include such issues/uncertainties as whether a dispositive motion will be granted, whether punitive damages will be awarded, and whether a limitations period will be imposed.

It is worth noting that in a 2002 Seventh Circuit case, Judge Richard Posner actually rejected a class action settlement because the trial judge had not done a decision analysis calculation: "[T]he judge should have made a greater effort (he made none) to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate."

DTA has been extremely helpful beyond assisting the lawyer and the client in assessing the potential exposure in a case. It has been used effectively to convince the adversary to accept a settlement, and to persuade a neutral as to the rationale behind one's evaluation.

In sum, early case analysis, with the use of the decision tree analysis, is the most cost-effective way to approach a case, rather than merely plowing ahead with the traditional serve an answer, then a motion, then settle or try the case.