The Evaluation of Cases is a Critical Element of Litigation Management

By Steven A. Lauer © 1998 *

Corporate America has awakened to the gravity of litigation expense. Law departments have devoted increasing attention to managing litigation in an effort to reduce that expense.

Much of that attention has been applied to what I call the "process costs" of litigation. Those are the fees and expenses that the client bears for the "privilege" of participating in the judicial process. I suspect that the priority resulted from several factors. First, those costs are easily identifiable. Second, they are within the client's control more than are some of the other aspects of litigation. Third, the legal profession has been an easy target for certain cost-cutting approaches because it is notoriously inefficient and its fees are often unrelated to results.

Those efforts can have but limited impact, however. They can address only those process costs. They do nothing to reduce the greater financial impact of litigation – adverse results. If corporations can reduce what they are ordered to pay at the end of the judicial gantlet, the potential savings are greater than what they spend over the course of that process. The non-economic impacts of judicial warfare (public-relations impacts, severed business relationships and other effects) can be significant, also. All these counsel in favor of resolution of disputes in other ways.

While there is a great deal of agreement that alternative resolution of disputes is highly desirable, there is not as much accord as to how to achieve that goal. Some companies have adopted aggressive postures in an effort to channel as many controversies into arbitration or another resolution mode as possible. Mediation has gained supporters, also. Other companies, while as supportive of ADR as the former ones, are less sanguine about the advisability of any one type of approach.

Whether to try to steer a contentious situation toward ADR or not and, if not, how to litigate it, requires more information than many companies have. Part of the determination of whether to settle a dispute and at what cost requires an understanding of the potential costs of that dispute if litigated. The "cost" of a dispute should not be limited to the process costs – the fees and expenses that one pays during a case's lifetime. The amount ultimately paid – after trial or settlement – should be included in the calculus. The costs should also be viewed expansively, to include impacts that are often less visible than the out-of-pocket payments to an adversary that are the results of court verdicts.

This was dramatically illustrated by the reported experience of a Maryland insurance company. That company deliberately switched much of its litigation to larger, more-expensive law firms. Despite paying higher hourly rates for its outside lawyers, the company saved considerable amounts in two ways. The aggregate sums that it paid to its opponents in settlements and judgments declined considerably (including a decline from what had been internally estimated as the settlement values of the cases). More surprising was the reduction in the legal fees it paid its outside lawyers.

Whether or not that result can be replicated easily, it does highlight the need to focus on both costs and results when setting litigation-management policy. A national consulting firm recently recommended that a law department "[c]onsider settlements and judgments, in addition to total personnel costs and outside counsel fees, as a measure of legal spending."

To do so effectively, however, you must realistically evaluate disputes in which you are or might become engaged. "Settlement at all costs" is not a viable policy. Rather, the resolution sought – whether by settlement or otherwise – must be appropriate to the situation.

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Treatises and articles on the subject of litigation agree with this common-sense view. For example, Richard Weise (formerly General Counsel of Motorola, Inc.) has written that "[a]t the heart of the ADR concept lies early settlement before enormous costs are incurred for defense, interference with valuable relations, and business and client interruption. At the heart of the settlement lies the knowledge of what it will cost you if you do not settle." A similar view was expressed several years ago by the authors of an article, as follows: "A strategic analysis of the major risks and uncertainties at the outset of litigation is essential for controlling legal costs and using resources more efficiently."

Other research is also supports the importance of case evaluation or assessment as a critical element of a litigation-management process. A 1996 survey of 159 companies in the Fortune 500 (74 surveys were returned) concluded that 88% of the respondents perform early case assessments. Those assessments typically included information about salient facts of the dispute (included in the assessment required by 68% of the respondents), assessment of opposing counsel, the judge and the potential makeup of a jury (51%), assessment of damages (84%), and a recommended litigation strategy (78%). Inside and outside counsel prepare the assessments jointly for 63% of the respondents.

In 1997, the same consulting firm cited earlier, after conducting a survey of law departments, reported that an early case assessment is deemed an effective cost-reduction tool, with a high or medium impact, by approximately 80% of the survey respondents. Surprisingly, fewer than half of the respondents track the relationship between outcome and costs, however. The reliability of that assessment of the effectiveness of early case assessment is somewhat suspect. Nonetheless, the need to understand the gravity of the specific dispute, and the likely or potential outcomes if it were to be resolved by judicial battle, is strong. Unfortunately, evidence suggests that few companies have a reliable means of doing so.

There are some case-evaluation methods available. They tend toward decision-tree analysis. Those approaches have some shortcomings, however. The decision trees tend to become quite complex in all but the simplest cases. Second, they suggest that cases can be reduced to very precise determinations of probability. Third, they are susceptible of manipulation. Fourth, stating one's opinion of the winnability of a case as a percentage chance of victory or as a single or series of "values" is not very helpful except in terms of filling in a blank on a form. All these weaknesses counsel in favor of applying them carefully and only in well-understood situations.

An important consideration in any case evaluation approach is the need for the results to be useful. The conclusions reached by counsel must be understandable by corporate management. They cannot be couched in lawyers' language. In the course of a recent roundtable discussion, participants discussed case evaluations. They stressed the need for accurate evaluations that can be conveyed to in-house clients readily. One participant noted that, in preparing evaluations, "outside counsel is often not as clear as I would like." The inside attorney should be the communicator with business executives.

The goals of any case-evaluation method should include at least the following:

- Create greater consistency in the case-evaluation approach.
- Provide greater guidance to all in-house attorneys as to the minimum standards for that task.
- Improve the ability to report to company management in a format that is more useful to management.
- Provide data that can be easily captured for periodic analysis.
- Accumulate historical data about the risk profile of the company's litigation.
- Keep the method as simple as feasible.

Inside and outside counsel have different perspectives. This is a truism, but it has important implications for this effort. Whatever approach to case evaluations that a company might adopt should take into account those differences and take advantage of them.

A case evaluation method should be flexible. Not all cases are alike. The precision possible for outside counsel opining as the merits of one case may be entirely absent in respect of another case. Even

with those acknowledged risks, however, in-house counsel must be able to elicit meaningful opinions from outside counsel about discrete qualities of each case. The approach adopted should not be constricting. If issues not included in the format are relevant to a particular, unusual case, counsel should address them.

While cases vary, there are certain criteria that generally have an acknowledged likelihood of affecting the outcome of the dispute. At a minimum, those criteria should be reviewed as to each case. How they are reviewed may vary, in terms of how elaborate the analysis is or how detailed the conclusions drawn should be.

Inside counsel should press outside counsel to provide opinions and evaluations of the various criteria that are specific. Outside counsel may be reluctant to be pinned down on these issues. Vague responses are not helpful, however, and they cannot provide the basis for the meaningful dialogue with company management. For that reason, in-house counsel should press outside counsel to provide more objective responses using some scoring scales.

Whatever method a company adopts should lead to data that can be captured in a database. While it is useful to be able to effectively evaluate a case in order to manage that case properly, it is even more valuable to be able to periodically review one’s experience in multiple cases. Analysis of an overall risk profile for a company, limited to one or a few types of cases or across the board, can help identify trends in litigation and risk exposure.

The ultimate goal of the case-evaluation exercise is simple. By assisting counsel (in and out) to work through a series of discussions of outcome-affecting criteria and supplying guidance as to how those criteria are to be weighted, the material should lead to a more consistent examination of the strengths and weaknesses in a company’s litigation position. By taking the results of that analysis and posing some questions about settlement value and other ramifications of the exercise, a law department can develop a more methodical means by which to determine which cases should be settled and at what cost. Clearly, there can be no uniform equation by which you determine the answers to those questions. But a consistent methodology should conduce toward more and fuller treatment of those questions.