

How To Litigate Successfully: Part 1 – When To Litigate

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Editor's Note: This article is the first in a series of five articles which will appear this year in The Metropolitan Corporate Counsel.

One of the most difficult and challenging decisions confronting in-house counsel is when to litigate. External and internal pressure abounds from shareholders, senior management, industry pundits, competitors and other litigation watchdogs. Will the costs of litigating be justified by the results achieved? Will the lawsuit expose the company to a potentially damaging countersuit? Will the company set the wrong tone if it doesn't litigate? Will company representatives withstand the scrutiny of being cross-examined? The purpose of this five-part series, beginning with this article, is to discuss in a straightforward and candid manner, when to litigate, how to litigate, how to reduce litigation costs, how to monitor on-going litigation and lastly, how to choose litigation counsel.

Knowing when to litigate is more art than science, more intellect than emotion, more instinct than textbook. It requires a broad and deep understanding of what is at stake, knowledge of the facts and applicable law and a thoughtful analysis by which to distill and assess this information in the light of sound business judgment. It is a talent, honed by experience, to be able to recognize, appreciate and objectively weigh the pros and cons of whether a matter should be litigated and if so, how best to shape it to one's advantage. A corporation exists to be financially successful in its business, not to spend its profits in litigation. Litigation should not be instituted when it is inconsistent with the best business interests of the corporation.

As this article is primarily about when to litigate, it presumes the element of choice although that luxury is not always present. However, many of the same principles concerning the commencement of litigation also apply to whether to settle or otherwise resolve a threatened or filed litigation against the company. While litigation is a necessary part of our judicial process, some litigations today are simply without merit and are intended to intimidate, bully and coerce defendants who are perceived to be easy targets with ample resources and a fear of negative or unwanted publicity. If compelled to defend litigation, strategic considerations of counterclaims and

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third party actions are of paramount importance. Regardless of which side of the caption you appear on, conducting oneself with a plaintiff's mentality – always seeking recovery, pressing the case, and dictating its direction – augurs well for its ultimate disposition.

Assembling the right brain trust to inform the Company's deliberations regarding when to litigate is essential. In addition to general counsel and those responsible for the success of the business, the group should also include a trusted litigator. By litigator we mean an individual who has a record of successfully trying cases through verdict as opposed to the all too prevalent type of litigator who has spent a career pushing paper.

Litigators v. Trial Lawyers

Never confuse a litigator with a trial lawyer. Litigators make motions, conduct depositions, attend conferences and yes, bill. Too often, their game plan is to work the case for maximum billing rather than trying the case and winning. They tend to grossly and unnecessarily overstaff their files using three, four, five or even more attorneys when one or two attorneys can do the job. Too many litigators look to paper the file to death, create issues where none exist, get into arguments over minor and petty points, ignore opportunities to settle and say whatever is necessary to keep the billing machine well-oiled. Yet when the time comes to try the case, many of these same litigators recommend settlement. So, after the company has been dragged through a grueling process and drained of millions of dollars, the litigators suddenly have a change of heart and tell the client all the reasons to settle. Naturally, such a sea-change in strategy is disheartening to hear and erodes confidence in the litigation process.

General counsel needs to have the confidence and courage to know when to litigate and who to choose as the best possible advocate for each particular case.

Too often corporations reflexively hire the same law firms they've used in the past but who rarely, if ever, take a verdict, let alone win. And, some companies choose a big firm with a big reputation so as to have political "cover" if things go badly. But often those decisions backfire and cost more than had a real trial lawyer been hired in the first instance.

Value Of Experience

Great litigators who actually try and win cases do not hesitate to advise clients to settle cases when they should and if reasonable to do so. They do not recommend expensive and time-consuming litigation when it is in the best interest of the client to be rid of the matter. It is beneficial for the team discussing when to litigate to have trustworthy input from an experienced trial attorney as part of the information gathering process. An attorney who has successfully tried cases to verdict and who is unconditionally committed to the client rather than just looking for another file to bill can provide invaluable insight not readily available from others. An attorney suspected of being



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motivated by fees should not be included in the discussion. An attorney who has not successfully tried cases to conclusion cannot provide a true and accurate perspective of when and how to litigate because he can only come at it from a viewpoint of settlement, not winning. The value of a trial lawyer who has the confidence to speak truthfully with the client about ongoing or prospective litigation is priceless. Strategy and tips on how to select litigators will be addressed in future articles.

Among the questions that need to be asked during this discussion include: Is this the right time to sue? Is this the right case? Are the facts of this particular case good for us? Is the law on our side? Are we willing to take this case to verdict? Do we like the venue? Is it a friendly jurisdiction for us? Is there more at stake here than this one lawsuit? Should the case be resolved and if so, what would be reasonable terms?

Preparing For Litigation

Litigation should not be commenced solely to teach someone a lesson or because you have the money to do it. Those reasons will not sustain the dedication needed as litigation bills pile up and time is spent culling through thousands of discovery documents or preparing for depositions. What may seem like a good idea on day one can look awfully suspect three years down the litigation road. There should always be a sound business reason to wage war. That having been said, once the decision is made to litigate, whether as plaintiff or defendant, it should be a decision to fight as hard as you can for as long as it takes to win.

Litigation should be viewed as a last resort but once the decision is made that litigation is the correct and necessary course, then the devotion, dedication and commitment must be 100 percent at all times until the mission of winning is

achieved. The case must be won. There is no other option.

When considering litigation, every effort should be made to resolve the dispute prior to the litigation. It is a mistake to have a corporate policy to litigate all disputes or settle all disputes. This is unreasonable and often self-defeating. Each case should be judged separately on its merits. When the point is reached that you realize that a resolution cannot be reached, then litigation (and possibly arbitration, mediation, etc.) becomes a viable alternative. As a general rule, negotiations prior to litigation should be conducted between the parties directly rather than through lawyers. Obviously when one side lawyers up, the other side must do so, too. Experience often teaches, however, that litigators are not very good negotiators because they feel a need to appear tough.

Unfortunately, we live in a society that seems to view accommodation and compromise as weakness. Much of the litigation clogging today's Courts exists because one side would not listen to the other or be willing to accept less than 100 percent of their position. Lawyers are often blamed for the litigation boom in America but the truth is that it is often the public, not the lawyers, who insist upon suing. It is extremely difficult for most attorneys to appear receptive to negotiating a settlement while looking confident in litigating the case.

Deciding when to litigate should be viewed as any other business challenge that confronts the company. Litigation should be consistent with the company's mission statement, justified by the likely costs and return on investment that it will yield, and an undertaking to which the company is absolutely committed to winning. Asking a seasoned trial lawyer to contribute to the decision matrix ensures that the ultimate decision of whether to litigate will be a balanced and well-informed one.