



Developing Informed Litigation Budgets

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Predicting the Unpredictable

- It is impossible to predict when a lawsuit may arise, how long it may last or how costly it will be.





Predicting the Unpredictable (cont'd)

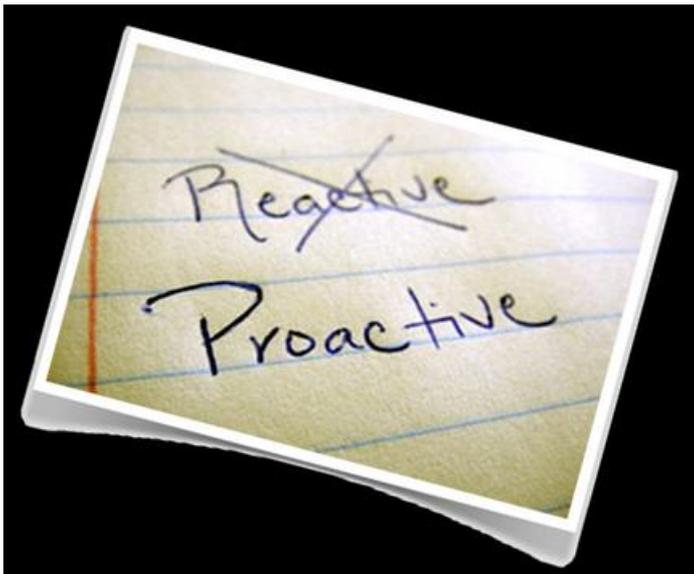
- Often, the best we can do is use early case assessment and value-proposition tools to develop informed estimates of the ultimate costs of a lawsuit.





Predicting the Unpredictable (cont'd)

- Reactive approach to litigation vs. proactive approach





Timing of Pre-Litigation Assessment

- Don't wait until your client is served with a complaint!
- Start evaluating as soon as litigation is *likely* or even *foreseeable*.





Timing of Pre-Litigation Assessment (cont'd)

- Example: statutory 30-day pre-suit notice requirements
- Should trigger prompt investigation/analysis.
- Often counsel can convince the plaintiff to drop the case, or can moot the action and limit the client's exposure to attorneys' fees.





Step-By-Step Case Assessment

- Work backwards from the client's goals.
- Use qualitative and quantitative assessments to:
 - Determine risk.
 - Reduce expenses.
 - Terminate cases as soon as practicable.
 - Otherwise reduce or eliminate further litigation expenses.





Identify, Collect, and Verify Facts

- A thorough understanding of facts enables counsel to get ahead of the process.
- Requires internal investigation and interviews, gathering documents and verifying information.



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Viability of Claims and Defenses

- Does the case have merit?
- Set out for client, and explain in detail:
 - All potentially applicable claims.
 - All potential counterclaims.
 - All defenses and third-party claims.
 - Estimated costs.





Viability of Claims and Defenses (cont'd)

- Create an early proof matrix.
- For each element of the potential claims/defenses, list:
 - Potential witnesses.
 - Possible documentary or other evidence.
 - Anticipated evidentiary hurdles and possible responses.



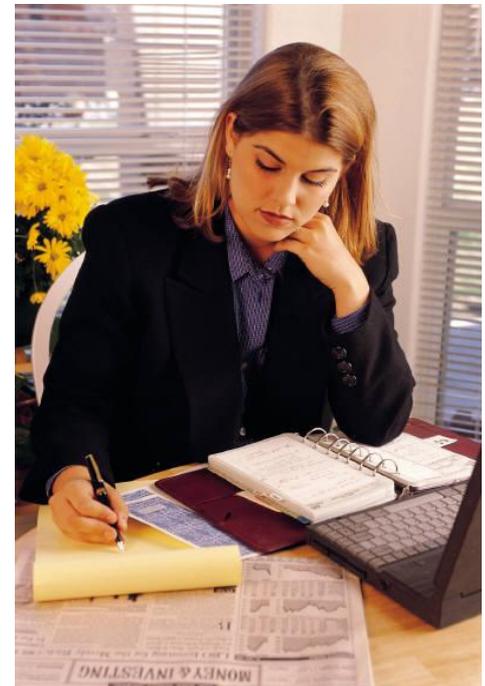
Viability of Claims and Defenses (cont'd)

Elements of Claim or Defense	Document That Will Establish the Element	Witness Who Will Establish the Element and Introduce the Document into Evidence	Anticipated Evidentiary Objection and Solution	Stipulations and Admissions



Viability of Claims and Defenses (cont'd)

- Draft a high-level opening statement and closing argument for both sides.
- Prepare a timeline of key events.





Tailor the Assessment to the Client

- Identify the client's non-legal business considerations.
- Identify the client's needs, level of sophistication and risk tolerance.
- Identify the client's cultural view of litigation ("spend money to make/ save money" vs. "control expenses at all costs").





Consider ESI Issues

- Take early steps to identify, preserve, harvest, and review potentially relevant and discoverable data.
- Costs of getting this wrong may be immeasurable.





Identify Key Witnesses and Documents

- Determine:
 - Who will do the review?
 - Are expert consultants necessary?
 - How many witnesses and documents may drive the case?
 - What are the staffing needs and ultimate costs of review?
 - Which document review tools are needed?



Know Thy Adversary

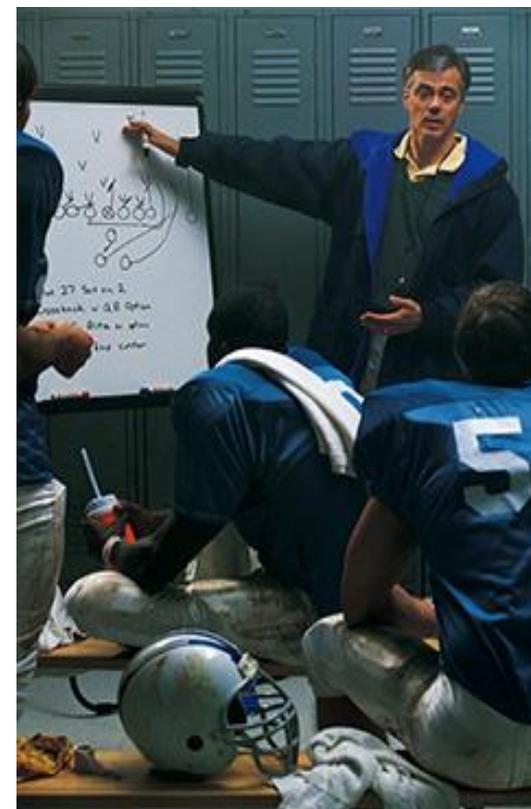
- Obtain all relevant information about:
 - Court
 - Opposing counsel
 - Litigation history; prior results
 - Reputation to settle vs. try cases
 - Financial stability
 - Opposing parties
 - Prospective jury pool





Develop a Game Plan

- Create a framework to help the client determine the best options for each stage of a case's life cycle.
- Goal: Identify a game plan that achieves the greatest number of objectives for the least amount of harm.





Develop a Game Plan (cont'd)

- Issue spotting:
 - Punitive damages or statutory penalties?
 - Applicable cap on damages?
 - Potential for copycat plaintiffs?
 - Information that client would like to keep private?
 - Insurance issues?
 - Reputational harm or attack on business model?



Develop a Game Plan (cont'd)

- Work through questions like:
 - Type of case?
 - Additional lawsuits on the horizon?
 - Related litigation?
 - Opportunity for a structured discussion between each side's high-level decision makers?
 - Ethical issues?





Early Settlement Considerations

- Work through questions like:
 - Cost of mediation/arbitration?
 - Might mediation/arbitration be effective given what is known at this point?
 - Separate settlement counsel?
 - Pre-certification settlement?
 - Examine end results in similar cases?





Early Settlement Considerations

- Consider internal and external pressures facing company.
- Allows counsel to develop a closer, more deeply informed relationship with client.



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Early Settlement Considerations (cont'd)

- Consider non-litigation costs, such as:
 - Reputational harm.
 - Damage to business relationships.
 - Continued business interruption and downtime.
 - Collateral consequences:
 - Debarment
 - Parallel criminal/administrative proceedings
 - Shareholder derivative actions





Selecting Outside Counsel

- Routine cases vs. “bet the company.”

- Finding the best fit for the particular case according to:
 - Knowledge
 - Experience
 - Reputation
 - Relationship with court and opposing counsel





Insurance and Funding

- Does the opposing party have insurance or third-party litigation funding?
- Can the client take advantage of any insurance policies?





Creating a Budget

- Helps inform the litigation plan.
- Helps decide whether to continue litigating at each stage in a case's life cycle.
- Establish how frequently counsel is to update the client when costs change and new expenses arise.





Creating a Budget (cont'd)

- Develop budgets for each of the various stages of litigation, from pre-filing through appeal.

- Consider questions such as:
 - Grounds for a motion to dismiss and likelihood of leave to replead.
 - How many witnesses will need to be deposed.
 - Volume of documents to collect and review.
 - Costs of preparing summary judgment motion.
 - Disagreements on class certification, removal, venue or other issues?



Creating a Budget (cont'd)

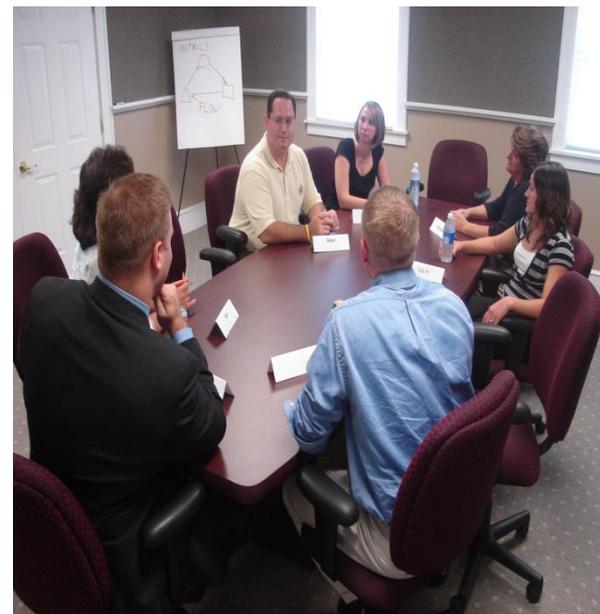
- Must take non-attorney costs into account:
 - Experts.
 - Outside litigation support, ESI specialists, etc.
 - Class notice.
 - Jury consultants.
 - Mediators or settlement administrators.





Conduct a Mock Trial and Survey

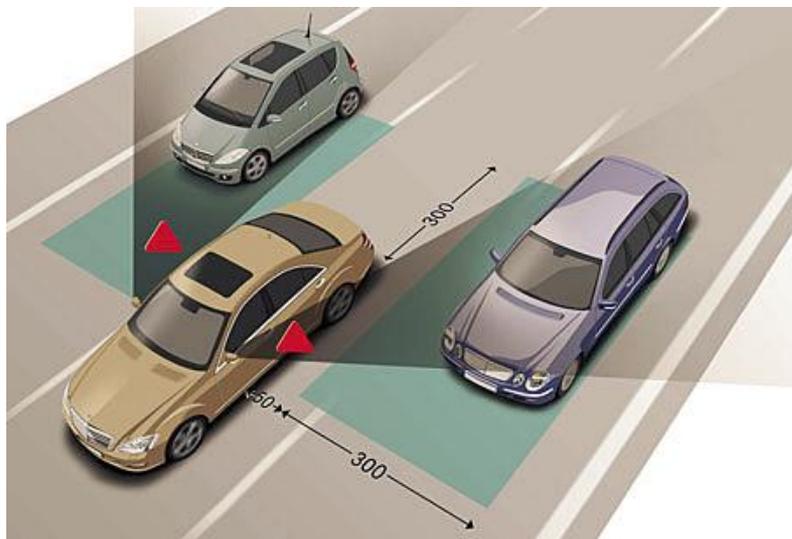
- A disinterested third party's views can be critical to early case assessment.
- Identify early gaps in the case and new ways of thinking about it.
- Test key themes, evidence and witnesses early.





Conduct a Mock Trial and Survey (cont'd)

- Integrate results of research into discovery plan.
- Identify confusing or sensitive areas that may require more detailed witness preparation and explanation.





Conduct a Mock Trial and Survey (cont'd)

- Consider a scaled-down exercise at the outset—more cost-effective.
- Consider auditioning more junior members of the team for key roles if the case goes forward.



Chart Potential Outcomes for Each Stage

- Pre-filing stage
 - Early settlement
 - Limit exposure by addressing conduct
- Pleadings stage:
 - Motions to dismiss
 - Removal
 - Transfer of venue
 - Consolidation
 - Bifurcation





Chart Potential Outcomes for Each Stage (cont'd)

- Class certification stage:
 - Certification discovery vs. merits discovery
 - Class plaintiff depositions
 - Discovery of absent class members
 - Dukes; Comcast: Identify individual issues that overlap with merits.
 - Interlocutory appeal of certification ruling





Chart Potential Outcomes for Each Stage (cont'd)

- Discovery stage:
 - Obtain complete picture of the other side's:
 - Capabilities
 - Cost constraints
 - Number of custodians
 - Scope of litigation hold
 - Volume of discovery
- Consider informal document exchange





Chart Potential Outcomes for Each Stage (cont'd)

- Discovery stage (cont'd)
 - Weigh benefits of predictive coding software
 - Evaluate retention policy and ability to execute
 - Compare e-discovery vendors





Chart Potential Outcomes for Each Stage (cont'd)

- Summary judgment stage:
 - One or more motions?
 - Learn the judge's individual practices and experiences in previous matters.
 - Period between filing and hearing is fertile ground for settlement.





Chart Potential Outcomes for Each Stage (cont'd)

- Pretrial conference stage:
 - Early identification of key documents and witnesses.
 - Early review of jury instructions and verdict forms.
 - Early assessment of evidentiary issues and motions in limine.





Chart Potential Outcomes for Each Stage (cont'd)

- Realistic assessment of costs includes:
 - Attorneys' fees
 - Expert fees
 - Trial support (demonstratives, technology, jury consultant)
 - Court reporter fees
 - Litigation war room
 - Printing/duplication
 - Servers and other equipment
 - Hotel, meals and travel



Chart Potential Outcomes for Each Stage (cont'd)

- Post-trial stage:
 - Consider risk of loss at trial and exposure to various categories of damages, fees and costs.
 - Consider costs of post-trial motions.
 - Consider attorney hours and related costs of post-trial hearings.



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Chart Potential Outcomes for Each Stage (cont'd)

- Appellate stage:
 - Record preparation, briefing and argument.
 - Appellate motions (dismissal, supplement record, expedited consideration, etc.)
 - Petition for review/certiorari
 - Merits briefing and argument in court of last resort.





Questions



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