

Opening Statement

Have a Plan in Litigation—It Works and It's Cheaper

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A few months ago *The American Lawyer* magazine asked me where money is most wasted in litigation. Without hesitating I answered the way most of you would: “During pretrial discovery.”

All of us have been involved in depositions that lasted too long, document requests that sought every imaginable piece of paper, interrogatories that roamed far afield, and discovery battles that raged broadly and endlessly. All of these raise costs; delay resolution; and increase dissatisfaction among lawyers, clients, judges, and the public at large.

Scholars, lawyers, and judges have all offered opinions about the causes of a pretrial discovery process run amok. Some point to the growing complexity of legal and factual issues, the larger volumes of documents (particularly electronic e-mails), and the higher monetary stakes in litigation as reasons for increasingly expensive and time-consuming pretrial discovery.

Each of these explanations is valid. But they all miss a growing problem in our profession we can actually do something about: Too many litigators—both plaintiff and defense—embark upon the discovery road without a map of where they want to go. They draft or respond to interrogatories, serve or respond to document requests, and take or defend depositions as if they're on autopilot, without regard to any particular litigation objective except possibly to overwhelm the other side.

Over the years I've learned to sit down with the lawyers on the team, particularly the newest lawyers, and develop a strategic litigation plan. A litigation plan is not the same as a discovery plan, which is just a list—sometimes in sequential order—of the interrogatories, document requests, and depositions to pursue.

A litigation plan does more. It identifies the strategic objectives in the case—the elimination of a particular claim, defense, or issue through a

focused motion for summary judgment or summary adjudication; the factual preparation of particular themes for trial. The plan then articulates specific techniques to achieve those objectives. A litigation plan requires an analysis of the legal and factual issues in the case, not just a menu of discovery options.

For decades lawyers who teach trial advocacy have been telling their students that the first thing to do in preparing a case for trial is to write the closing argument. The same principle applies at the outset of the whole case. If you think the case can be won at summary judgment, develop a plan to take the discovery needed to set up your motion for summary judgment. If you think you cannot win the whole case on summary judgment but you can narrow the issues to be tried, have a plan to eliminate claims or defenses before trial through motions for summary adjudication or motions in limine. If the case might be tried, identify the handful of issues likely to matter at trial. If you do these things, interrogatories will be more focused, document requests narrower, and depositions shorter and directed to the key issues in the case.

This approach seems obvious, right? So why isn't it happening?

The most cynical critics say that lawyers are churning cases to generate higher fees. I don't buy that. While there may be unscrupulous lawyers, just as there are unscrupulous doctors, bankers, and stockbrokers, the vast majority of professionals are genuinely trying to do what's best for the clients, patients, and customers. Moreover, only lawyers who are paid by the hour would benefit financially by churning cases, but the lack of a strategic plan plagues many lawyers, whether they're paid by the hour, on a contingency, or with a fixed fee.

The fundamental reason for the absence of strategic plans in most cases is that fewer litigators are actually trying cases. Until you try cases, whether to a

judge or a jury, it's hard to see what you need to do to win; and if you don't know from the outset what you need to win, it's hard to devise a plan to get there.

The first time I went on a camping trip, I took far more gear than I needed—just to be safe. I ended up carrying about 30 extra pounds on my back and came to really regret it. On my next trip, I took a lot less.

Litigating my first case was like that first camping trip. I didn't know what I needed to do to win, so I played it safe and did everything, most of which turned out to be unnecessary.

Too many lawyers litigate cases as if they're on their first camping trip. They don't know what they really need, so they play it safe by covering every possible base (serving every interrogatory, requesting every deposition, deposing everybody, and asking every conceivable question at depositions). Costs skyrocket as they wander aimlessly down the road of litigation.

Faced with ever-growing litigation expenses, some clients have used the meat-ax approach to control litigation. They insist on discounted rates, reduced staffing, or other rigid cutbacks, thinking that these techniques will somehow reduce costs overall. These techniques, while understandable, often fail to achieve any significant effect.

Several years ago a large corporate client hired me to defend a multimillion dollar commercial lawsuit. Almost immediately, the company counsel asked me to fill out a "Budget and Litigation Plan." The preprinted form asked for an estimate of the hours to be spent on the usual pretrial steps—interrogatories, document requests, depositions, discovery motions (filing and defending), and motions for summary judgment. Nothing on the form asked for an explanation of our strategic objectives or a justification for any particular deposition or other discovery technique.

After reading the form, I suggested that we spend 30 days analyzing the case and then prepare a short memorandum setting forth our strategic objectives and explaining what discovery would be necessary to achieve them and how much time this would require. Company counsel rejected this, insisting that the form be filled out. I dutifully completed it, but to stress my point, I added a handwritten entry for "strategic thinking" and estimated a certain num-

ber of hours. He returned the form, striking my addition.

I tell this story not to embarrass this company lawyer. Indeed, his approach is an example of many similar attempts to hold back the rising tide of litigation by fiat—by simply resolving not to spend so much money. This is a sensible goal, but it's rare that you can cure a financially ailing company by budgeting or by cutting back expenses 10 percent across the board. A cure usually requires something more fundamental—reordering priorities, goals, and plans. So, too, with litigation.

Some years ago, a friend who is a journalist was sued for defamation arising from a newspaper story she had written in a few days. Her deposition dragged on and on. After 14 days of deposition, her lawyer finally filed a motion for protective order. The judge allowed five more days of deposition, for a total of 19 days.

Unless the case involves the reasons for the fall of the Roman Empire *and* a single witness saw it all, no witness requires 19 days of deposition. The reason my friend's deposition went on so long is that neither side had thought through the handful of issues on which the case would turn—the issues on which the case would either be settled or tried.

In 1990, Congress passed the Civil Justice Reform Act, designed to address many of the problems of pretrial discovery in civil cases. One proposal called for judges to schedule early case management conferences at which they would question the lawyers about their cases and help streamline the ensuing pretrial process.

The results have been mixed. Many judges have used early case management conferences to force the parties and lawyers alike to analyze their cases and to develop focused pretrial plans that will govern the rest of the litigation. In other cases, lawyers have submitted meaningless plans that list the discovery they intend to take, propose scheduling dates (like trial) much too far out in the future, and fail to identify key legal or factual issues that, if addressed early in the litigation, could lead to early settlements or trials.

It is beyond the scope of this column to analyze every possible way to streamline litigation, reduce costs, and

accelerate time to trial or settlement. I offer the following suggestions not because they are the only, or even the best, solutions but in the hope that they will stimulate continued discussion of these important issues:

1. Encourage all litigators to try cases, including pro bono cases, so that every litigator takes at least one case to trial every five years;

2. Encourage all senior lawyers to mentor more junior lawyers by teaching them how to try cases and how to conduct pretrial discovery pursuant to strategic objectives and a strategic litigation plan;

3. Require both sides, at the earliest possible time in the life of a case, to submit a litigation plan explaining what discovery they intend to take and why, as well as what motions (both summary judgment/adjudication and major in limine motions) will frame the case for trial or settlement;

4. Require early case management conferences at which the judge would question the attorneys about the litigation plan and make sure both sides are focusing on the issues that matter; and

5. Schedule trial for nine to 12 months after the complaint is filed.

Others have identified a number of important and specific ways to streamline litigation—like restricting the number of interrogatories and document requests, limiting the total hours of depositions each side can take in a case, and prohibiting all attorney colloquy at depositions (other than the questions asked and any legal grounds for the objections). We will get much more out of these reforms if lawyers figure out what they need to do to win, and then develop a plan to get there.

The American justice system is the best system the world has ever known for resolving disputes. If all of us—lawyers, clients, and judges—work together, we can make sure it maintains its place as the fairest, most democratic means of resolving disputes in the world. □