

FOCUSING ON LITIGATION RESULTS: The Role of the Case Manager

Litigation grows ever more complex and costly. Gone are the days of small trials, when the lawyer would pick up a slender file on Monday morning, learn the names of the parties and the basic facts, and then pick a jury. Instead, trials are preceded by a mountain of discovery: often tens of thousands of exhibits, dozens of depositions, and a score of legal issues. Corporations routinely settle matters based as much on the litigation cost as on the merits. This complexity is multiplied when related, but different, issues are being fought by multiple parties in multiple venues. Sometimes the litigation is complicated by administrative actions by national, state, or local government agencies. Perhaps politicians are using the litigation as a chance to posture in public. As inside counsel, how do you manage this complex litigation so that it does not manage you?

The answer lies in organization, structure, and planning. Monitoring complex litigation isn't enough; someone has to manage it. In other words, what you need is a case manager.

In Brief

- In complex litigation, company management often wants to be proactive, but that desire all too frequently translates into activity for activity's sake, with no real benefit.
- To really focus on results, consider using a case manager for large cases—not a lead trial lawyer, but one whose job is to manage the case's resources.
- Personality types, budget responsibilities, and other hiring tips are included.

**BY DONALD P. BUTLER
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Results Needed: The Game Is Not the Thing

The corporate culture has embraced the idea of proactivity. In the legal world, this means that a defendant or a potential defendant takes the initiative. This has resulted, however, more often in activity for activity's sake, rather than in strategic action directed toward a specific goal. Unfocused action does not necessarily advance your goals; in fact, it may backfire. It is also guaranteed to drive up costs.

By contrast, a model that focuses on results will limit actions to those that do advance the corporate goals. The major drawback to the results model is that it requires that most difficult (and therefore rarest) of all commodities—hard thinking. Specifically, it requires hard thinking at the outset, rather than later. Hard thinking at the outset will produce specific goals, an outline of the needed steps, and an estimate of the necessary resources. This kind of detailed planning permits accurate budgeting and allocation of resources.

The other drawback to the results model is that it requires a case manager: not simply inside counsel who monitors the case, but an actual manager who coordinates all the players and the strategy. Although a case manager may add expense, a good case manager will also add a results-based litigation strategy that should ultimately save you money by eliminating needless action.

Case Manager Wanted: Lone Ranger Need Not Apply

As inside counsel, your first step is usually to inform management that a complex case has been or is about to be filed. Your second step should be immediately to retain a case manager. But whom should you select?

Inside counsel can act as case manager, if he or she has the expertise, time, and personality. But most companies face complex litigation only occasionally, so that inside counsel usually has limited hands-on experience in actually managing (as opposed to overseeing) a complex case. Most inside counsel also lack the time required to manage a complex case; their time may be better spent in keeping management informed and mobilizing internal resources.

The lead trial lawyer is also rarely the best choice. Too many aspects of complex litigation are not directly related to a trial. And a lead trial lawyer's time is usually better spent preparing for trial than managing the efforts of others.



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Generally the best choice is someone with case-management experience. The ideal case manager must have:

- superb organizational skills, capable of tracking the filing, answer, and counterclaim deadlines for tens or hundreds of different plaintiffs in different jurisdictions;
- charm and charisma capable of managing high-profile trial lawyers (and rein-ing them in where necessary) as well as corporate executives, in-house counsel, and support staff;
- the ability to see details as well as the big picture;
- a team-player focus (a complex case is no place for Lone Ranger egos); and finally,
- a sensitivity to controlling costs.

Therefore, the best case managers usually are either litigators or appellate lawyers. In general, these lawyers are familiar with a systems approach to handling cases, are adept at delegating matters, have a healthy respect for planning and deadlines, and do not resist reporting in writing.

Fee Arrangements: Costs Are an Object

Complex litigation is costly. Proper management can help, but many cost-control opportunities are available only early in a case. Again, what you need is a case manager who will do the hard thinking at the outset. But what about the costs of the case manager herself?

Legal fees are traditionally based on hours billed, with a self-evident incentive for inefficiency. On the other hand, a fixed-fee arrangement also presents another skewed incentive: to do as little as possible. A purely contingent (or for defendants, a reverse-contingent) fee is plausible, but may result in a huge payout at the end of the day, which management may later resent. And, understandably, a law firm acting as case manager may be reluctant to devote enormous resources if it faces a substantial risk of walking

away with nothing several years later.

The optimal fee arrangement for a case manager might therefore be a fixed fee with incentive compensation attached. Under this arrangement, as client you can budget your costs by paying the fixed fee in monthly installments, with the incentive reserved over time. The case manager can also budget its own resources, without the risk of financial ruin if the case is ultimately lost. And the case manager's

Tips for Finding a Case Manager

- Probably the best place to begin looking is with corporate counsel who have been involved in complex litigation.
- Look for outside counsel with experience; you don't want a case manager who will have to learn on the job.
- Personal interviews are advisable; case management often demands intensive management of egos, often under time pressure. You need someone with charisma and the right personality, one compatible with your corporate culture as well as with your trial lawyers.
- Insist on a case manager who will handle the role personally, rather than delegating it to others.

only economic incentive will be to do as much as it takes to secure the incentive—no more and no less. Of course this arrangement has many possible variations, such as increasing the monthly installment in exchange for crediting some or all of it against any incentive compensation earned. If the case is truly in a crisis mode, you can agree to pay your case manager by the hour for one month, while a different fee arrangement is being negotiated. In fact, this typically may be the fairest way to treat the case manager, since it will usually take a few weeks to assess the case and to determine what an appropriate fixed fee and incentive would be.

Determining the Desired Results: What's the Goal?

Once hired, your case manager should assist you in determining the desired results. The initial step in this process is uncovering *all* the possible results under the given facts, both good and bad. This step will require legal research and fact-gathering teams. (See "Managing Legal Research," on p. 32.)

A legal research team must:

- consider issues of jurisdiction and venue;
- uncover all potential claims and defenses, along with potential damage models (whether they have been pleaded or not);
- determine the availability of counterclaims or third-party claims, insurance coverage, and the like; and
- coordinate with the fact-gathering team that is investigating the facts by reviewing documents and talking to employees or witnesses. Facts uncovered should be fed to the legal researchers as quickly as possible.

Once all potential results have been realistically assessed, your company can select and prioritize its desired results. Does the company want a quick settlement, regardless of the cost? Is the goal to try the case, win, and then settle on favor-

able terms? Should there be a protracted struggle to send a message and discourage future claims? Is there a rational reason to fight to the death for vindication? Is the goal to win on appeal, establishing a precedent that will eliminate future cases? Or is there some middle path? Once your company realizes what it is really after (and why), a different result may better fit what you really want at the end of the litigation.

Strategizing: Think Before You File

Without a coherent strategy, your tactics may work against your goals. With your case manager's assistance, you must develop a strategy as soon as you have determined your desired results—and continue to develop that strategy as the litigation unfolds. In fact, you will need multiple strategies: for law, facts, corporate finances, PR, and internal resources.

The law

A law strategy considers when to assert certain claims or defenses. In complex litigation, it is not uncommon for multiple claims to be filed, often in multiple jurisdictions. It is critical that the case manager create an easily understandable process for tracking when and where each claim was filed, what the appropriate response deadlines are, and whether the necessary responses to each claim have been made. (See "Tracking the Wild Claim," on p. 27.)

And of course, the case manager's management of your law strategy isn't just about deadlines. Different claims in different jurisdictions may demand different strategies. For example, in some jurisdictions you might begin with special exceptions or a Rule 12b(6) motion, followed later by a no-evidence motion for summary judgment, followed much later by a traditional motion for partial summary judgment. In other jurisdictions you might decide that no dispositive motion should be filed at all before trial; some courts routinely reject all motions for summary judgment, in which case the motion would simply run up costs and educate your opponent. On the other hand, if settlement were your goal, you might file the motion even if you were sure it would be denied.

Case management of the legal strategy must also take insurance coverage into account, which will probably be affected as the litigation develops amended claims and defenses. Again, the presence of different claims in different jurisdictions, possibly covered by different insurance policies with different notice requirements, calls for an extremely high level of organizational skill.

The facts

Without question, the biggest cost of complex litigation is discovery. Too many lawyers blindly follow a general tac-

tical plan: requests for disclosures, requests for admissions, interrogatories, and so forth. In ordinary litigation, the possible inefficiency of this routine may not be apparent. But in complex litigation, where having to re-ask a question or seek another round of discovery can involve multiple cases in multiple jurisdictions and the coordination of all the lawyers in all the different parties, small inefficiencies quickly add up to major costs. And of course, poor discovery tactics can have other costs as well. But it can be extremely difficult for any one person, no matter how experienced, to be sure that he has identified all the pertinent questions and requests for, say, one hundred different plaintiffs in four different factual categories spread out over five different jurisdictions. Thus the case manager must have a strategy and a system for coping with any or all of:

- multiple opponents with slightly different case facts, potentially requiring different approaches in discovery;
- multiple cases filed in different jurisdictions with different discovery rules and deadlines;
- huge numbers of documents, files, electronic material, or other evidence, all of which must be analyzed, incorporated into the strategy, and linked to the appropriate issue, case, or party.

(See “Tracking the Wild Claim,” on this page.)

Complex litigation must therefore have a specific plan that structures and integrates discovery. A discovery plan is not simply an order fixing certain cut-off dates. Instead, it is a detailed, confidential plan of what discovery is to be pursued in what order, with alternatives based on what is discovered. The plan may also consider various potential discovery motions and the possibility of mandamus proceedings if the motions are denied. The plan must take into account the available resources, so that it can also be used as a detailed budget for financial planning. (For a simplified example, see “A Sample Discovery Plan,” on p. 28.)

The discovery plan allows intelligent staffing. Before beginning discovery, the client and case manager can determine how many lawyers are needed to cover discovery on each issue. This avoids having to add lawyers unfamiliar to the case later in the process, and can lead to a discovery schedule that permits estimates of resource allocation.

Evolving the fact and law strategies

Your strategy of course should continue to develop as you develop the facts. The initial law and fact investigations should produce an outline for key facts to be discovered, with a comprehensive chronology that can be continually updated. As discovery uncovers new facts, the research team should look for helpful cases. The case manager should act as the coordinator, relaying new factual information to the research team and new legal information to the factual team.

Tracking the Wild Claim

A good case manager will have a good tracking system: one with multiple backups, preferably supplemented by at least one manual system monitored by a good paralegal, and one with the ability to calendar any grace-period deadlines in addition to the original deadlines. A good tracking system not only calendars events, but also ties them to the particular case at issue. Thus, the case manager can review what events are approaching on what days across the full spectrum of cases, or can access the upcoming events for a particular case. Good case-management software will also connect email and paper files with particular matters for easy retrieval.

Case management and tracking, of course, are also important for the critical ability to organize discovery in multiple ways, according to legal issue, factual topic, chronology, witness or document source, and forum. This multiple path organization allows the maximum flexibility not only in retrieval, but also in rearranging the discovery materials to support what will emerge as the themes for trial.

Corporate finances

A financial strategy must take into account more than just the money at stake in the litigation and the costs of litigation (and insurance or reserves coverage for those costs). It must also consider the potential effect on the company's financial life (see “The True Costs of Winning . . . and Losing,” on p. 28). There may be repercussions in the financial markets or in the court of public opinion (and thus sales), shareholder complaints or suits, government regulators, legislative committees, and spin-off or copy-cat litigation. A settlement strategy is part of this analysis. For example, do you want to minimize costs and publicity, or to settle only for a rock-bottom price? If the former, start the settlement process earlier. If the latter, later or not at all.

PR strategy

Your company should quickly develop a consistent message—a theme—about the litigation. It then should consider who should deliver the message, when, where, and how. Usually one internal spokesperson is best, but the information should be coordinated with inside counsel and the case manager to keep the information accurate and consistent with the theme.

A good message and its transmission through the media can assuage financial concerns. It can also affect public

opinion, which might impact the litigation. While ethically public statements may not be intentionally used to affect the tribunal or jury itself, they can sometimes be used to soften up the other side for settlement. Furthermore, a public relations strategy can be used to reduce the risk of a large punitive damages award. Aside from affecting public opinion, the media's reporting of the event can permit continued sales, reduce punitive damages, and prevent financial panic by investors (see "The Big Picture," p. 30).

Internal strategy

The first requirement of an internal strategy is a firm commitment from management to assist the litigation with the required internal resources. This commitment should be communicated clearly throughout the company, as should a commitment to confidentiality, speaking with one voice, and protecting evidence.

The internal strategy should also address:

- who to keep informed within the company,
- how often and how detailed the information should be, and
- who provides the information and in what format (oral or written).

Keeping management informed is best left to inside counsel, who are familiar with the management's style and concerns. This also leaves outside counsel free to handle the case.

An internal strategy may also need to address other issues.

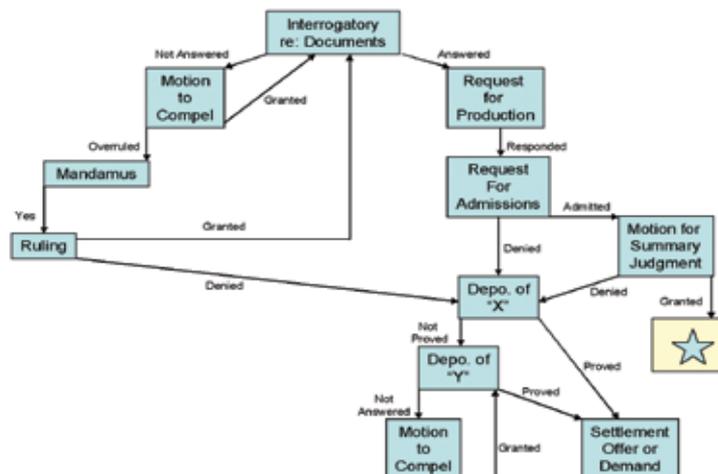
- Is management to blame for the problem? Are there board members maneuvering to replace the CEO or Chairman?

The True Costs of Winning ... and Losing

What might happen if the case goes badly?

- How will the litigation affect the value of shares? Would a huge judgment increase the risk of a takeover? Should a poison pill be put in place now to prevent a takeover if the stock price later plummets?
- Would an adverse judgment cause lenders to accelerate debts, placing the company in a precarious position? Would judgment liens unduly encumber the company's property? Would deals to sell subsidiaries fall apart or be blocked? (We once had a client pay several hundred thousand dollars more than was warranted to settle a case on appeal in order to be able to sell a subsidiary for several million dollars.)
- Could the resulting judgment be stayed? Would bankruptcy loom? Recall that Texaco Inc. was forced into bankruptcy by Pennzoil's multibillion-dollar judgment against it.
- In the interim, would the litigation make suppliers and customers wary of renewing or entering into new contracts with the company? Would prospective joint venturers demand indemnity?
- Could the company's bank funds be garnished or attached? Or could there eventually be a turnover order, so that a receiver friendly to the opposition is appointed to run the company?

A Sample Discovery Plan



- Is someone else in the corporation likely to be a scapegoat? Is the general counsel in the line of fire—and in that case, could his continuing involvement in the litigation create tension?
- Are there disgruntled employees or whistleblowers who may testify adversely?
- Are trade secrets disappearing into the hands of the opposition or competitors?
- Is the time spent by employees in responding to discovery costing the company too much?

Organizing Resources at the Outset

As soon as the strategies are planned, decide how to implement them: identify, organize, and allocate resources. This requires inside counsel and the case manager to identify likely needs, to organize a schedule based on the probable timing of those needs, and to plan the timely allocation of resources. What legal skills will be needed? Which lawyers have them? When will those skills probably be required? The case manager should organize these staff resources into teams with communication structures, so that information can be effectively shared both upstream and downstream. The case manager should work to minimize the inevitable friction among the teams.

Support staff can also be crucial. For instance, in one particularly large case, we organized secretaries and legal assistants into shifts, so that we could generate documents around the clock. The case manager can foresee such likely needs for support staff and arrange for their deployment.

In a complex case, the client (usually with input from the case manager) will need to retain multiple counsel for

settlement negotiations, discovery, and trial. The client also will need a legal research team (preferably headed by an appellate lawyer); a financial team (consisting of key members of the company's financial department, but augmented by corporate and perhaps bankruptcy counsel); and an internal-management team (usually headed by the general counsel). It may also find an insurance lawyer useful to keep pressure on carriers who are acting timidly about coverage. And finally, it will need a public relations team, consisting of an outside public relations consultant or the company's own public affairs officer. The various team leaders must have some administrative ability, and, because they are essential as information conduits, they must be reliable and prompt.

The teams will require not just leaders, but also members. But it is inefficient simply to throw bodies at a case. Thus, the case manager should consider: What kind of work needs to be done, and who is the best person to do it? For example, legal research by a partner may be more efficient than by a younger lawyer, if the partner's expertise will speed the research.

Thus the makeup of your legal team cannot be determined precisely until you have decided and scheduled your tactics. Law firms who skimp on these preliminary planning stages often underestimate the number of attorneys needed to staff a large case. When they later add attorneys to the case as it progresses, the client loses money and time while the new attorneys are brought up to speed.

Communicating

The case manager must coordinate the different teams while keeping the client fully informed, putting the case manager's communication skills at a premium. The case manager should persuade as well as inform: Keeping a large number of people pulling in the same direction requires that everyone understand (and ideally agree with) the reasons for the course of action. It's also worth remembering that complex litigation is a high-pressure situation—superb lawyers acting under tight deadlines are not always known for the modesty of their egos. A persuasive case manager can do much to keep everyone working together smoothly.

Thorough communications require periodic meetings or conference calls, though limited in the number of participants. Email groups, extranets, and videoconferencing all have their place in handling a complex case and should be used liberally. They also help save time and money by cutting down on travel.

Usually one conference per week is sufficient; a conference on Friday morning enables everyone to catch up with the week's developments, to decide on further steps, and to prepare for events scheduled for the next week. Of course,

The Big Picture

In the wake of the Tylenol deaths in the mid-1980s, Johnson & Johnson's executives essentially admitted the existence of a safer alternative design, which their outside lawyers probably cringed at. But management saw the big picture—not only would showing their immediate concern limit punitive damages, but keeping their product safe in the minds of consumers would continue sales that would likely far outstrip any future damage awards. They also quickly determined that the core issue in the case would be the intervening criminal conduct. They relegated all other issues to a secondary role and focused on the result they wanted: to get this quickly behind them. This was a classic case of managing complex litigation successfully.

the supervising inside counsel should be encouraged to participate in these meetings, and the supervising inside counsel and the case manager will probably converse almost daily, occasionally several times a day.

For the weekly conferences, an agenda should be prepared, circulated, and followed to the extent possible. Without some structure, conferences can ramble because lawyers tend to talk too much. A good case manager will lead the group back on track without stifling good ideas or hurting feelings. Usually, only the team leaders need participate in the conference. In one large case, we observed that every lawyer and legal assistant working on the matter was included on the weekly conference call—a total of about 45 professionals. It is not surprising that the calls dragged on for up to four hours on occasion, often with little substance.

Tactics, Schedules, and Budgets

As we outlined above, the case manager, team leaders, and client should brainstorm every possible action toward carrying out strategies that address law, facts, corporate finances, PR, and internal issues. The aim, of course, is to create an overarching plan that will achieve your desired results. The case manager and team should then consider alternatives based on anticipated countermoves by the opposition. After grouping the possible actions into chunks relevant to different parts of the case, they should prioritize them, decide what resources would be necessary, and schedule the chosen actions. This, in turn, permits much more accurate budgeting.

Anticipating surprises

Many lawyers resent budgets, while more and more clients demand them. One problem with budgets has been their inherent unpredictability. Usually, however, surprises result from a failure to have thought through the case at the outset. Many of litigation's inevitable surprises can be anticipated, at least as possibilities, and taken into account in the budgeting process.

Furthermore, budgets can also offer a constructive structure for handling the case. The more a budget forces counsel to think of all the things that must be done, might need to be done, and could be done, the more the client can be confident that counsel has considered everything necessary to the efficient handling of the case. For example, focusing on the budget might force the realization that a deposition of a minor witness in Detroit can be handled by written questions or orally by a junior associate instead of by a videotaped deposition by a partner. Similarly, a budget might reveal that an esoteric point will become relevant only if a certain fact is elicited during discovery. Instead of putting a pack of associates on a scorched-

earth research mission early in the case, the company can perhaps reserve the issue for a later date—by which time the case may have settled without the client ever incurring that research expense. (See “Managing Legal Research,” on p. 32.)

Monitoring interim results

The case manager must constantly monitor the outcomes of the selected tactics in order to adjust them and the budget as necessary. In the rare instance of a major factual, legal, or financial surprise, the company's strategy may need to be completely rethought. But proper initial

ACC Resources on . . .

Case Management

InfoPAKs:

- Outside Counsel Management (2004), at www.acca.com/resource/v247.

Annual Meeting Course Materials:

Program material from ACC's 2005 Annual Meeting is available at www.acca.com/am/05/material.php, including:

- Thomas D. Gaillard, Richard A. Parr II, Robert H. Peahl, “Benchmarking Outside Counsel Performance—A Roadmap,” course 305.

Webcasts:

The following webcast is available at www.acca.com/networks/webcast/:

- Managing Outside Counsel: Getting Off on the Right Foot—And Staying in Step (January 18, 2006).

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- Bridgeway brings best practices to corporate legal departments for matter management, corporate governance, electronic invoicing/cost management, mass tort and contracts management. www.bridgeway.com.

For more ACC extras about case management and outside counsel relations, see the *HandsOn* in this issue, and visit www.acca.com/docket/mar06/value.php.

It's also worth remembering that **complex litigation** is a high-pressure situation—**superb lawyers** acting under **tight deadlines** are **not always known** for the modesty of their **egos**. A persuasive case manager can do much to keep everyone working together **smoothly**.

planning should minimize this possibility by taking the potential for change into account when developing the initial strategy.

Trial preparation tactics

Trial preparation tactics largely rest on the lead trial lawyer, with the case manager helping to coordinate the trial lawyer with the teams usually involved in preparing witnesses and legal memoranda. Most clients require daily reporting of developments, and press inquiries are not unusual in a high-profile case. The case manager can be invaluable in taking on many of these nontrial tasks, so that the trial team can focus on the trial itself.

Losing the trial

Case management doesn't end with the trial—particularly if the trial is lost. A loss at trial requires management on multiple levels. First, the losing party must worry about financial repercussions and public relations. It may need to:

- employ the public relations team to reassure creditors, shareholders, customers, and suppliers;
- activate the financial and legal teams to seek a supersedeas bond or a reduction in the bond, to prevent implementation of the judgment;
- have the internal management team communicate effectively with management and employees, to answer the inevitable questions and avoid profitless panic and scapegoating.

And of course, preparation of an appeal will require case management.

Learning from the Experience

When it is all over, the case manager can be invaluable in helping the client review the experience, as the case manager will have observed the various teams in action and will have probably have the clearest idea of what led to the litigation. At the same time, of course, the client will want to review the performance of the case manager. Were there too many surprises? Were there too many tantrums and turf battles? Was the case manager cost effective? Did she communicate effectively and promptly?

The Rewards of Good Case Management

A good case manager can ensure that effectiveness and efficiency are not at war with each other, but actually complement each other. This should improve the quality of the legal services being provided to the company, while controlling the costs. Imagine telling your management that you have figured out a way not only to get better results, but also to reduce costs. That usually leads to a promotion, or at least a good bonus. A good case manager can become a valuable friend. 

Have a comment on this article? Email editorinchief@acca.com.

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Managing Legal Research

Unnecessary legal research is one of the most costly aspects of complex litigation. Because complex litigation often involves multiple claims raising multiple issues in multiple jurisdictions, the need to understand and track which law applies to which claim can quickly overwhelm unprepared counsel.

But even when legal research can be concentrated in one jurisdiction or issue, the high stakes of complex litigation can create a pressure to leave no stone unturned. This is rarely productive; few precedents are ever directly on point. Too many lawyers perform legal research backwards, by collecting holdings and then trying to match them to the case. Instead, once a lawyer has some familiarity with the law at issue, he should stop research and begin to think: What rule is fair to the parties? What rule is workable in the real world? Then he should resume research. Almost always, he will then find a case supporting that rule. In the rare instance where there is no authority, a court is likely to adopt the rule anyway, as the best rule, even in the face of some adverse (but no doubt distinguishable) authority.