Four Practical Rules for Winning Complex Cases

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The threat of complex, high-stakes litigation is unfortunately a well-known fact of life for too many companies doing business in the United States. Due largely to a combination of the extensive pretrial discovery permitted in U.S. litigation and the high cost of lawyers, major litigation can cost millions of dollars and take years to resolve, diverting the time and attention of important executives in the process. Some of these cases can threaten the viability of a company, particularly if they proceed to trial, where uncertainty is a given. Accordingly, statistics confirm that the overwhelming majority of civil cases are ultimately settled before trial—and too often after most of the discovery, cost, and collateral damage associated with the litigation have been incurred.

This article—the product of 35 years of experience litigating and trying cases in courts around the country in a broad array of practice areas—offers four practical rules to follow in order to successfully, expeditiously, and cost-effectively resolve significant disputes that are either in or on the brink of protracted litigation.

First, perform a sober and early case assessment that accurately projects how a case would be likely to unfold, and dispassionately evaluates whether it should be litigated at all.

Second, assuming war is inevitable, decide judiciously which claims, defenses, and motions should and should not be litigated in order to successfully resolve the dispute—with "winning" defined strictly in terms of the client's realizable commercial objectives—and then develop and sharply hone the strategy along the most direct path to achieving that result at the earliest possible moment.

Third, build your case entirely on positions and themes that are factually true, fair, and comprehensible—not on clever efforts to massage and force the case either within or outside prior precedent.

Finally, particularly because you may be asking a court to take some unconventional actions—procedurally or substantively or both—you must execute flawlessly. This includes marshaling and unleashing a well-coordinated team with all the requisite technical skills to ensure that you win the battles necessary to achieve success for your client.

Taken together, these rules reflect a practical, business-centric approach to litigation rooted in a few fundamental tenets about how our judicial system works in practice. Above all, they require the ability to foresee how disputes are likely to unfold in the real, messy world of complex litigation—as well as the fortitude, creativity, and skill necessary to develop and then execute a strategy based on that vision.

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Rule 1: Soberly Evaluate the Case and Pick Your Battles Wisely

The first point is simple but critical: The biggest determinant of whether you will win most lawsuits—as well as what they will cost—is not the brilliance of your lawyers' briefs or witness examinations, but your initial judgments as to whether and where you should be fighting—and not fighting. If you engage in the wrong, avoidable battles—particularly against accomplished adversaries—you are very likely to fritter away a fortune and, years later, either lose or enter into the same settlement that could have been achieved much earlier.

Although this should be obvious, too many companies and counsel fail to make good, disciplined decisions, either at the outset in deciding whether to litigate or, when the case proceeds, in deciding which claims, defenses, and motions to assert. In some cases, such overreaching may be prompted by a client's anger and unrealistic quest to use litigation to obtain vindication, vengeance, or a pot of gold—desires that more often than not go unrealized. But it can also result from counsel's failure to foresee or advise the client as to how a litigation is likely to unfold once the shooting starts against effective adversaries. The end product is an overaggressive pursuit of myriad possible claims or defenses and the failure to confine the litigation, to the extent possible, to those battles that are essential to achieving the client's realistic business objectives.

Decisions concerning whether and what to litigate, and not litigate, must be made by inside and outside counsel working together every step of the way. Making these decisions well requires discipline and two important skill sets on the part of counsel. The first, referred to more generally above, is the ability to envision what will probably happen if litigation proceeds. This includes making an early assessment not only of the likelihood of winning but also of the procedural path the case will likely take, along with the corresponding expense, disruption of the client's business, potential damage to its image, and other collateral damage. Obviously, no lawyer can predict the outcome of complex cases with certainty. This is particularly true at the outset of a dispute, before you know all the facts, your adversary's strategy, and the judge's inclinations (or even the judge's identity).

Nevertheless, armed with a very focused and expeditious investigation of the facts and pivotal legal issues, experienced litigators should be able to offer sound and dispassionate judgments with respect to such key issues as whether the company should be able to win the case on a threshold motion to dismiss or will probably have to run the gauntlet of discovery—and what that is likely to entail and cost based on some reasonable assumptions and parameters. Counsel also should advise the client whether, after enduring the expense and burden of discovery, there is likely to be a strong motion for summary judgment or whether the case is likely to go to trial, along with an assessment of what that path is likely to cost and the prospects of prevailing.

Some companies have institutionalized this type of analytic process. For example, GE developed both an "early case assessment" process and an "early resolution" process that, respectively, require outside counsel first to carefully evaluate the case and then to make recommendations for the most expeditious way to arrive at a satisfactory resolution. While some legal research is often required, two steps in the process are generally more important. First, counsel should get a sufficient handle on the facts to make a reasonable diagnosis and prognosis. This generally involves some review of key documents (ideally including emails of the most critical witnesses) and a handful of witness interviews, preferably armed with the documents. Different clients take different approaches as to how extensive this preliminary document review should be. As for the witness interviews, one oft-made mistake is to postpone interviewing the most senior corporate officers until the eve of their depositions. To the extent they were important actors in the events that gave rise to the dispute, interviewing them early, preferably after a review of their email, is essential to accurately assessing the case and developing the litigation strategy.

Second, having soberly assessed the case, counsel must have the backbone to tell the client's senior lawyers and executives—who are often outraged at an adversary's conduct or demands—what they may not want to hear. For example, counsel must be prepared to advise, tactfully but forcefully, a client who seems hell-bent on litigating to first agree to mediation and, if possible, settle up-front to avoid a costly and disruptive mess that would in all likelihood be settled later anyway. Some trials, while winnable, are fraught with enormous economic or reputational risk. The client may not be willing to take the risk when the time comes; counsel's job is to advise the client accordingly.

Rule 2: Identify the End Point and Keep the Litigation on the Shortest Path to Get There

The basic point here is that counsel must quickly identify the earliest point in the litigation process at which a result should be attainable that, from the client's business perspective, will be the best practicable outcome to its problem. Counsel should then exercise discipline and technical skill to drive the litigation down the most direct route to that outcome, doing everything possible to avoid extraneous battles along the way.

For example, assume that a case cannot be settled on acceptable terms before litigation proceeds but that counsel's judgment is that after some targeted discovery, the client should be able to win a motion for summary judgment that would either dispose of the case entirely or eliminate a major claim or defense and

thereby alter the adversary's valuation of its case and increase its willingness to settle. Such a motion could attack a plaintiff's case based on the statute of limitations, forum non conveniens, the parol evidence rule, the plaintiff's lack of injury, or some other essential element of the plaintiff's case. Counsel should then focus on the likelihood of persuading the court to adopt a phased case management plan that will, in the first instance, confine and channel the litigation along the quickest path to the end point you have identified.

If there is a discrete body of discovery that can be conducted in order to set up a motion that will either dispose of or significantly streamline the case, many courts will agree—and Federal Rule of Civil Procedure 16 encourages them—to phase discovery so as to accelerate the litigation of that motion while holding other discovery in abeyance. Judge William W. Schwarzer put it this way in discussing the Rule 16 preliminary conference:

> Once federal jurisdiction has been established, the most important function of the conference is the identification of pivotal issues. This process reduces many seemingly complex cases to simple, clearly defined issues that can be resolved more easily than appeared at first. For example, the Rule 16 conference may reveal that the plaintiff's right to recover ultimately turns on whether a legal defense bars the claim. Resolving that defense by motion, or perhaps by a separate trial, can save time and expense.

William W. Schwarzer & Alan Hirsch, The Elements of Case Management: A Pocket Guide for Judges 5 (2d ed. 2006), *available at* www.fjc.gov/public/pdf.nsf/lookup/elemen02.pdf/$file/elemen02.pdf.

In order to win the contentious battle to obtain a favorable case management order that will phase and limit discovery and set up a dispositive motion, it is important to demonstrate that (1) the limited discovery necessary to the motion can be conducted and the motion made quickly and without inordinately delaying the litigation, (2) it is a serious motion with a reasonable prospect of ending or significantly narrowing the case, and (3) going down this path could obviate the substantial expense and burdens (especially for the court) that the full-blown discovery and litigation would otherwise entail.

To identify the earliest optimal end point for a case and the strategy for reaching it, counsel needs to think creatively. Break the habit of viewing litigation as a process that must proceed in a linear way beginning with a complaint followed by the traditional succession of other pleadings, threshold motions, document production, depositions, summary judgment motions, and a possible trial. Rather, the various procedural tools in the litigator's kit can potentially be used at any time in the quest to solve the client's problem at the earliest possible juncture. Which devices and strategy to use, and when, will depend on the nature of both the problem and your adversary.

For example, is your adversary also looking for a constructive way to resolve a difficult dispute, albeit one that may require some litigation in order to educate the parties and enable them to better assess the strengths and weaknesses of their positions? If so, then a concerted effort should be made to find ways to facilitate an early consensual resolution. This could include, for example, voluntary production of documents even in advance of litigation or other informal means to educate each other about key facts outside the formal discovery process.

If, in contrast, you are confronted with an aggressive adversary who will not be reasonable until after having been softened up by powerful blows in the litigation—e.g., the deposition of its chief executive officer—it probably will not make sense to waste time and money on preliminary dispute resolution mechanisms, such as mediation, until the case has proceeded for some period. In that event, however, it is important to reassess periodically whether the grounds have shifted and created an opportunity for an early end that will best serve the client's business interests and, if so, to identify the best procedural path and strategy for achieving it. In that regard, alternative dispute resolution devices such as mediation should not be regarded merely as techniques to use just before or after the commencement of litigation. Rather, counsel should continually be on the alert for a good opportunity to employ them profitably as the litigation progresses. Similarly, counsel should continually consider whether the record has developed to a point where a meritorious motion for partial, if not complete, summary judgment can be made that would likely cut the litigation down (or advance the case, if representing a plaintiff) in a way that would position it for a successful settlement, if not resolve it completely.

Finally, in some cases, an analysis of the nature of the dispute and the adversary's personality will lead to the judgment that, in all likelihood, the case will have to be tried. In those circumstances, counsel should concentrate their efforts and the client's resources on positioning and preparing the case so as to obtain and win a prompt trial—without a lot of nonessential and avoidable motions, discovery, or other unproductive diversions. This will often entail conducting mock jury simulations considerably earlier in the process than may be customary in order to identify winning themes and lines of attack, and to shed ineffective ones so that discovery and other case investments can be focused on and limited, insofar as possible, to the most productive areas. Valuable simulations can also be conducted in non-jury cases, including arbitrations.

In any event, having identified the most direct path to a successful resolution of the litigation, efforts must be made at every step of the case to avoid, to the extent possible, becoming embroiled in discovery or motion practice that is not essential to your game plan and that likely will only serve to increase the expense, delay, and disruption of the litigation. Of course, you will

not have an unfettered ability to avoid "nonessential" litigation, as your adversary will undoubtedly be pressing to pursue some of the very claims, discovery, or motions that are undesirable and certainly unneeded from your perspective. Nevertheless, to a significant extent, you can minimize these kinds of detours and, of particular importance, undercut your adversary's ability to pursue them. Thus, the decisions about which claims and defenses to assert, what factual allegations to make (in pleadings or affidavits), what discovery to seek or oppose, and which motions to make must be made with a careful eye toward their practical ramifications and how your adversary will exploit them as the litigation proceeds.

For example, it may be gratifying to assert a claim under the Racketeer Influenced and Corrupt Organizations Act and cast your adversary as a serial criminal, but it is almost certain to embroil your client in costly and time-consuming procedural challenges that ultimately are unlikely to advance your chances for achieving success, let alone endear you to the judge. Accordingly, unless such a claim is likely to prevail, or pursuing it is central to your game plan for some other reason, resist the temptation to assert it. Similarly, when making factual allegations, consider the ensuing discovery requests that they are likely to trigger, and confine your pleadings to those allegations that are truly important to winning and that offer the most direct path to success. Finally, the same thought process should govern decisions about what discovery to resist and which motions to make or oppose.

Obviously, complete avoidance of extraneous litigation is impossible, especially when confronting an effective and aggressive adversary. Nevertheless, to the extent you do everything possible to avoid the quicksand of unproductive discovery and motion practice, and resist the temptation to fight everything your adversary seeks—instead making concerted efforts to consensually resolve nonessential disputes—you will significantly advance the cause of streamlining the litigation while substantially increasing the odds of a prompt and successful resolution.

Rule 3: Build Your Case Based on Positions Rooted in Common Sense and Fairness, and Don't Be a Slave to Precedent

The gist of this rule is that if a position on the facts makes sense and is fair, a good litigator can almost always find sufficient law to support that position, and a way to win. True, there are times when there is truly binding law on the other side. But these are rare. This third rule is based on the basic belief, borne out by experience, that our legal system is one that, while expensive and disruptive, will produce fair and sensible results in the vast majority of cases that are well handled.

Too many lawyers, trained in law schools and law firms to read existing case law and construct clever arguments based on prior precedent, lose sight of the fundamental point that the goal of our common-law legal system—and of most individual judges—is to reach results that are fair under the facts and circumstances of each individual case. They become overly beholden to, and confined by, prior case law and tend to forget that past precedents were, when issued, merely vehicles to accomplish that goal. Accordingly, some lawyers approach a case by searching for existing case law and then trying to massage or twist the facts of their cases to force them either within or outside of the facts of some prior decision that has good or bad language for their case.

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The great lawyers I have been privileged to work with approach every new, complex case from the other direction: They quickly dive into the facts—and particularly the heads of their client's decision makers—to assess whether and why their client's decisions and actions made sense and were fair and, thus, whether their current position in the dispute is strong. They then build their case on that foundation. And experience has confirmed that if you stake out and litigate a position that is true and fair, you will find the case law you need to support that position—even if there is no prior decision directly on point. Sometimes the support will come in bits and pieces rather than from analogous cases, and sometimes, when there are no existing cases that squarely support your position, you must go back to the roots or original principles of the law. Indeed, sometimes you must look for support in entirely different areas of law with analogous principles or even beyond the U.S. legal system. But if you think and search creatively, you will very likely find the support you need to persuade a court to adopt a position that makes good common sense and is fair.

Following this approach often requires the fortitude to litigate without the safety net of existing precedent and with the conviction that, if you present a case that is consistent with the truth and basic principles of common sense and fairness, you will find *or make* the law needed to win. Thus, the bottom line is that rather than beginning by burying the heads of young lawyers in prior case law and having them write lengthy memos to develop clever legal arguments, lawyers should build their cases

by immersing themselves in their client's business and developing a thorough understanding of why the client's actions made sense and were fair—or why what your adversary did was unfair or otherwise improper. And, harkening back to the first rule, if this process does not yield good answers, reconsider whether the war really has to and should be waged at all.

Rule 4: If Your Execution Is Great, You Will Likely Win

In following the second and third rules, you will frequently be asking a court to adopt procedures and make substantive rulings that make good sense but may vary from the way things have usually been done. To persuade courts to deviate from the usual path of least resistance, your position must be developed and presented well, with meticulous attention to detail every step of the way. (It also requires a judge who will then likely be receptive to this kind of creative approach.) This article is not the place to discuss each of these facets in detail, so what follows are merely brief observations regarding a few of the most important.

First, develop powerful themes and the truthful "story of the case"—and then consistently base your position on them at every phase of the litigation. The tension here is to develop your themes and case story early, including for purposes of preliminary conferences with and submissions to the court, while retaining sufficient flexibility to adapt and evolve the story as more facts emerge, particularly during discovery. Here, as elsewhere, performing a solid early case assessment—based on a sufficient investigation of the facts—is essential.

Second, use the depositions you take as the potent offensive weapons they should be. While good litigators differ on this point, and there is no one-size-fits-all approach, many lawyers squander the full offensive value of depositions. This is particularly true in an era when depositions are limited to six to seven hours and are videotaped under rules that significantly restrict lawyers' interruptions to protect a witness. Given these limitations, it is essential to avoid wasting time on unimportant questioning of important witnesses, such as lengthy probing of a witness's background in cases where it has little or no strategic value. Moreover, the benefits of pursuing an aggressive, offensive approach to depositions—making extensive use of cross-examination—are enormous, particularly when deposing an adversary's senior officers, who may not have taken adequate time to prepare for a well-planned cross-examination at the deposition stage. Treat the depositions of most important witnesses as if they were trial cross-examination—and carefully prepare for them accordingly—with the goal of destroying the witness and/or the adversary's case and thereby paving the way to a favorable settlement, setting up a well-founded summary judgment motion, or obtaining valuable testimony for use at trial.

Next, thoroughly prepare your client's senior officers for their depositions. The flip side of the coin regarding offensive depositions is that it is imperative—for both defensive and offensive purposes—to ensure that your clients are as fully prepared to be aggressively cross-examined at their depositions as if they were testifying at trial. Once again, this is because, in the age of videotaped depositions and rules limiting counsel intervention, these witnesses are on their own once the deposition begins and their testimony can and likely will be either your best asset or your worst nightmare at trial. This admonition applies in particular to a client's senior officers whose testimony, by virtue of their position and often the roles they played in key decisions and actions in dispute, will inevitably carry enormous weight, especially if the testimony is bad.

Finally, be prepared to try the case and show it. Your team obviously must have the ability to try a major case well—adept at using the latest courtroom technologies—and must make clear from the outset and throughout the litigation that you are fully prepared to try the case and win it. This is important not only to triumph in those cases that actually proceed to trial but to obtain favorable settlements beforehand.

This list could go on, but the point is simple: To achieve successful results in complex cases at the earliest practical point—or at trial when trial is necessary—counsel must combine the ability to think and litigate outside the box with the ability to wield the traditional litigation tools powerfully at every point.

We live in an overly litigious society with a legal system that is in some respects the best in the world and in other respects despised and fairly criticized. On a positive note, the transparency that U.S. discovery produces and the lack of formalistic pleading rules tend to produce sensible and fair results. However, the combination of this same discovery process and other procedural factors—such as the elimination of technical pleading requirements that used to do a better job of weeding out groundless cases, and the lack of a rule requiring the losing party to pay attorney fees—make U.S. litigation exorbitantly expensive and overly disruptive.

If pursued together, the four rules outlined herein offer a business-centric approach to complex litigation that is calibrated to both the pros and cons of our system. Employing this approach will enable you and your clients to avoid or minimize disruptive litigation and its cost by approaching the process in a disciplined and creative way that constantly seeks the result most tailored to the client's business needs. It also ensures that, when litigation is unavoidable, the strategy will be based on—and carefully honed to—the most powerful procedural *and* substantive positions possible. In the hands of proficient litigators, this should enable the client to "win" at the earliest possible moment with the least possible expense and intrusion. ■