

# Proactive Litigation Management: Aligning for Success

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Proactive litigation management strategies are essential to the effective management of a client's overall litigation exposure. Whether the litigation involves an individual matter or a portfolio of matters, that exposure can encompass not only settlement and litigation costs, but also the costs associated with organizational disruptions, reputational damage, and stock price fluctuations. For those reasons, sophisticated clients have implemented strategies specifically designed to expedite the resolution of their legal matters at a reasonable cost. Such strategies serve to improve litigation outcomes, increase staff productivity, and reduce the potential exposure associated with the client's litigation portfolio. While outside counsel will certainly be laser focused on defending the specific piece of litigation at hand, it is important that he or she also understand the broader strategies that the client has in place to mitigate their litigation exposure and how they can best partner with the client to help achieve their business objectives.

Proactive litigation management is not about paying any price to resolve a matter and close the file. Rather, proactive litigation management is intended to expedite the various aspects of the litigation process to the reasonable extent possible to achieve the best, realistic outcome, considering both the target resolution objective and the attendant costs of achieving that result. While this management approach is particularly suited to commodity type cases, which generally involve limited degrees of complexity and exposure, it can be applied to a wide variety of matters. The potential benefits are largely a function of the types of litigated matters in the client's portfolio, the opportunities available to mitigate their litigation exposures, and the client's litigation risk appetite.

Maximizing the success of a proactive litigation management strategy requires that outside counsel and in-house counsel, as well as claims litigation professionals in the case of insurance litigation, are in alignment when it comes to business strategies, specific case resolution objectives, and the client's economic interests. Those strategies and expectations are often documented in the client's litigation management guidelines. Ensuring that all parts of the defense team work together toward agreed goals and understand the steps necessary to achieve those goals and which can significantly increase your chances of success. With that in mind, below are five steps to consider when proactively managing litigation.

## Early Case Assessment

The first step in proactively managing litigation is performing an early case assessment. This approach can be used with a wide variety of disputes, both before and after litigation begins, and often works best as part of a formal program focused on the proactive resolution of specific portfolios of commodity-type matters. Not only are plaintiff's counsel typically more

likely to “play ball” regarding such lower complexity/severity type matters, but clients are in a much better position to evaluate the exposure posed by such cases and measure the success of the strategy across the specific portfolio. Early case assessments, and the resulting case-specific resolution plans, will generally involve: an objective evaluation of the potential liability and damages exposure, identification of additional, critical information needed to more fully evaluate the case, a plan to proactively obtain that critical information outside of formal discovery, if possible, key decision points requiring dialogue with the client, and a negotiation strategy designed to expedite the resolution of the case at the target price. In addition, the proactive resolution plan may also include a voluntary information exchange with the opposing party, agreements to delay responsive pleadings or discovery to permit negotiations, and planned early mediation, assuming opposing counsel is willing to negotiate an expedited resolution at a reasonable price.

While the parties may not be able to resolve the matter at an early stage and litigation may be required, every reasonable effort should be pursued before deciding that litigation is the only viable alternative. Even if litigation is determined to be the best option at some point, outside counsel should revisit the plan over the course of the case and look for opportunities to proactively resolve the case, rather than incurring additional time, effort and litigation costs that can potentially be avoided.

### Obtaining Critical Information

Before a case can be properly evaluated, the critical information required to determine the extent of the client's liability, any viable liability defenses, and the realistic range of damages must be obtained. Some defense counsel pursue every piece of available information in the hopes of finding the “smoking gun.” This “leave-no-stone-unturned” approach is an inefficient and expensive approach to case management that rarely has the hoped-for impact on the outcome of a case and may actually serve to increase the value of the case.

Once counsel and the client have agreed on the critical information that is required, creating a focused plan to expeditiously acquire that information will accelerate the information gathering process and better position the case for an early evaluation, negotiation, and resolution. That plan should consider to what extent the information can be quickly gathered outside of the standard discovery process, and if opposing counsel is unwilling to voluntarily provide the information to expedite settlement, whether it can be obtained from other sources.

The same mindset should also apply to the discovery process. While opposing counsel may pursue his or her own “scorched-earth” approach to discovery to the extent permitted by the court, outside defense counsel as a good steward of the client's money, should pursue their discovery in as focused and cost-conscious a manner as possible.

## Client Dialogue and Decision Points

Part of an effective proactive resolution plan includes dialogue with the client at key decision points throughout the life of the case. Managing to decision points helps to keep the litigation and the associated costs aligned with the agreed plan and budget. Decision points typically occur once agreed upon actions have been completed and/or critical pieces of information are obtained. At that point, outside counsel and the client review the status of the case, discuss the impact of information obtained to date, and agree upon any course corrections to the litigation plan required to best position the case for resolution at the target amount, weighing the various benefits, risks and costs associated with different actions or tactics.

## Proactive Evaluation

Once the critical information is obtained, and assuming liability is established at least to some degree, the next step is to evaluate the case and determine a fair settlement value. Evaluations should be a detailed, objective, and transparent assessment of liability and damages. The best approach will generally include a detailed breakdown of the realistic range of damages and some form of a decision tree analysis to help determine the most likely outcome or outcome scenarios, and the estimated value of the case. The approach should foster a meaningful dialogue with the client and allow the client to make an educated decision as to the reasonable settlement value of the matter in the context of the facts and applicable law, the potential litigation risk, and the projected costs associated with continued litigation.

## Proactive Negotiation

Once the case has been evaluated, the next step is to consider making a settlement offer. Based on the assumption that the plaintiff's counsel might under-evaluate their case, outside counsel is often reticent to make the first move, preferring to solicit a demand. However, studies have shown that people subconsciously anchor on the first offer presented in a negotiation. Because the first offer tends to frame the negotiation, the defense should make the initial offer to commence negotiations, outlining the merits of the case from the defense perspective and managing plaintiff's expectations as to the value of the case. That offer will reflect the defense perspective on liability, damages, and any other pertinent considerations, based on the information at hand and reasonable assumptions.

The key to proactive negotiation is making a realistic initial offer, based on the legal standards and a thoughtful discussion of the merits of the case. Low-ball or unrealistic offers only serve to harden the respective positions of the parties and make an expedited resolution of the case virtually impossible, and for that reason, should be avoided. Plaintiff may counter with an unrealistic demand, but at a minimum you have started to manage plaintiff's settlement expectations.

Proactive negotiations, and proactive litigation management in general, should be put in the right context. This process is not about settling the case at all costs simply to get the file closed. If the opposition is not willing to engage or engage on reasonable terms, they need to understand that the defense team is equally willing and able to take the case to verdict, if necessary, where plaintiff has some jeopardy of obtaining a lesser verdict or nothing at all.

### Win-Win: Aligning for Success

Outside counsel is a key partner in effectively executing a client's proactive litigation management strategies. In this role, outside defense counsel should not only demonstrate alignment with the specific case resolution objectives, but also the client's broader business objectives and economic interests. While that can often be a challenge considering the "scorched-earth" strategies employed by other parties to the case, defense counsel should still approach each case in a focused, creative manner, mindful of the client's objectives, and with the appropriate sense of urgency.

Proactive litigation management often requires a new way of thinking, different from the "safe" approach of methodically executing the standard litigation drill, pursuing every piece of information to ensure no one is second-guessed later, and waiting to commence negotiations until after discovery is completed and trial is imminent. When outside counsel effectively leverages their legal expertise and acumen, along with the necessary creativity, courage, and perseverance, they can help achieve their client's business objectives and better differentiate themselves and their firm in a very competitive legal market. When counsel and the client are truly aligned, everyone wins.

Thomas Lysaught has provided operational leadership and strategic vision to large insurance claims organizations for more than 35 years. Thomas is currently Vice President, Head of Casualty Claims, for QBE North America in Chicago, where he leads the Auto, General Liability, Latent Injury, and Professional Liability claims teams. He has a keen understanding of how insurers and in-house legal departments can work closely with outside law firms to improve quality, reduce costs, and gain the actionable insight needed to enhance business results.