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A business-minded approach to litigation and trial

A SAFE AND JUST SOCIETY NEEDS PROFITABLE CONSUMER LAW FIRMS. PROFITABILITY BEGINS WITH PROPER BUSINESS ANALYSIS OF EACH CASE

Each day, more attorneys are coming to the realization that the practice of law is a business and not just a profession, and that the recipe for long-term success is to run their law firms like a business. As a result, they're giving more thought to how they can increase their revenues, decrease their expenses, and improve their profit margins – all while continuing to secure the most favorable results possible for their clients.

But attorneys, particularly those with practices where cases occasionally go to trial, would be wise to view their cases through the same business-colored glasses they've been viewing their law firms through. After all, a law firm's cases are the building blocks upon which its profitability (or lack thereof) is built. A firm will be hard-pressed to turn a profit if its clients' cases are not handled with efficiency.

The careful monitoring of your cases begins with your first interaction with a would-be client and ends when you or a colleague has a check in hand from the defendant or its insurer paying the settlement or judgment in the case. In this article, I will walk through how attorneys can attempt to ensure their clients' cases are handled successfully for their clients as well as their firms.

Before I go any further, I want to clarify that our firms' success goes hand in hand with our ethical duty to provide zealous advocacy for our clients. We should always provide client service that exceeds their expectations. We have a duty to our clients to maximize the value of their claims. On the same token, if our firms aren't profitable, we won't be in business for long. Without an engaged and active plaintiffs' bar ready and able to fight corporations and insurance companies, our would-be clients would have nowhere to turn for aggressive legal assistance. It is not hyperbole to say that a safe and just society needs profitable consumer law firms in order to stay that way.

With all of this in mind, here is how we can ensure the success of our firms.

Analysis begins even before the attorney-client relationship begins

Your firm's client intake process is where your analysis should begin. Your or your colleagues' discussions with a would-be client about their legal issue, and the eventual weighing of the merits of their case, will provide you the first opportunity to determine whether the case can be successfully litigated.

The first step will be to set a budget for the hard costs associated with the would-be case. At our firm, we back into the budget by first coming up with a potential value for the case. The initial budget is set between five and seven percent of the estimated value of the case. You then have to factor in the time you will incur in working up the case and the opportunity cost of working on that given case versus other cases in your office.

Then a simple mathematical calculation can give you an idea of whether or not a case is the right case for your firm. For example, if you think you have a 50% chance of securing an $800,000 settlement for a client, you should look at the case as a potential $400,000 matter! But if, including your time and financial investment in the case, your investment in the case ends up at $150,000, the $160,000 fees (at 40%) may not end up being the best return on your investment.

Of course, case budgets change as cases progress and different issues come to light. While only about five to ten percent of civil cases go to trial these days, your initial budget should cover all phases of litigation up to and including trial. Better to know as soon as possible what kind of budget you'll likely be working under for the duration of the case, even if it is resolved before trial or even summary judgment.

For cases similar to those you've previously litigated at your firm, you'll likely be able to quickly identify the key issues and then come up with a budget based on how you know such a case was previously valued.

But when you don't know this information already, you aren't sure what the key issues might be that drive your valuation of the case, or you are interested in determining early on what the strengths and weaknesses of a particular case might be, focus groups could be a worthy investment. They will likely cost you as little as $1,000, but an early focus group can help you and your colleagues determine the issues in your case or provide a relative value and where you might need to spend money, such as on experts, visuals, reconstructions, and the like. This will, in turn, help you both estimate a budget and figure out whether the potential recovery should justify that budget.

Another key element of this first phase of your analysis is to meet your would-be client(s) as early as possible. This might be during the intake phase or soon after they officially retain your firm. But you need to know early on whether your client(s) are credible and likable. Will a jury love them? Hate them?

The manner in which you would expect a client to come across based on what a piece of paper says their demographics and life experiences might differ from how they come across in person. A client who cannot appear likable could bring down the value of their case, which could render it a poor case to take on based on how you have budgeted for it.

Your analysis should continue as litigation heats up

So, you've analyzed the value of a potential client's case, developed a budget for it, and feel like it is the right case for your firm to handle. You're comforted by the results of a handful of focus groups and many face-to-face and video conversations with your client.

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But as litigation kicks into high gear, you'll need to continue to keep your attention on those early predictions.

For one, you'll need to adjust your case value as the litigation progresses and brings with it events that will likely force you to revisit the value of the case and the budget you have to work with. Have you successfully fended off the defendants' motion to dismiss, retaining all claims? Or were they able to prune a few particularly promising claims? These developments could affect the value of the case, your budget for it, and its value as a case you have made an investment in through your firm.

As the discovery process takes flight, have additional facts emerged that change the damages calculus? Have new expert reports done the same? Have you had to spend more during discovery than you were planning on, thus wreaking havoc on your budget? Has a new path to punitive damages revealed itself, increasing the potential value of the case and the budget you have to work with? Has a focus group found new strengths or weaknesses in your client's case that affect the value?

Second, and on a related note, discovery can get expensive quickly. Of course, expert witnesses are never cheap and can cost you dearly when they are needed. But depositions are expensive too, especially when you factor in the costs of official transcripts and technology that is becoming commonplace, such as real-time transcripts. I've been involved in non-class action, non-mass tort cases where there have been 15 or 20 depositions. With the cost of depositions easily surpassing $2,000 each (including video), they can add up fast and push your budget to the brink.

Third, 988 settlement offers and policy limit demands used wisely and in a timely fashion can prevent expenses from getting out of control in a case where the value is likely to hold steady. Experienced counsel on either side of a case know the ramifications of 988 settlement offers and policy limit demands. They'll bring them to their clients and explain what's in it for them to accept those offers or demands and resolve their case promptly. For the right cases, these tools can keep those cases out of court, which will, of course, keep the expenses related to litigating the case down. These tools also reduce the risk that our clients will walk away with less than they deserve. Of course, if you overplay the hand you're dealt in either situation, you and your client will pay a hefty sum.

Finally, mediation should be explored as an efficient and cost-effective way to resolve a client's case, especially one that is relatively straightforward regarding liability and damages, and whose value is unlikely to change during the litigation process.

Despite your hunches about what kind of settlement or verdict you could secure, mediation can bring a prompt end to litigation if the defense provides a reasonable enough settlement that your client can get behind and is well within the range of what you would consider to be a favorable resolution given the facts and applicable law. If nothing else, mediation provides a pre-trial glimpse of the defense's best arguments.

When you approach and begin trial, continue to monitor your costs and the potential value of the case

As you have progressed through the litigation process and find yourself preparing your client's case for trial, you have hopefully heeded my advice and carefully budgeted your expenses relative to what you believe the value of the case is. When the time for trial is right around the corner, however, that is when a large portion of your case cost is going to kick in.

At this point in a litigation, we need to be cognizant of the sunk-cost fallacy, which is an inclination by us to continue doing something, such as waiting in line or continuing to pay for a product or service, if we have already spent time, money, or effort doing it, regardless of whether we will receive an adequate return on what we've invested. In other words, we must avoid getting married to our cases.

We've all been there before. We think we have a winner of a case. Sure, it is expensive to litigate and eventually try, but we have great facts, a likable client, favorable case law, and encouraging focus group results. Therefore, we continue to invest in the case, without factoring in things outside of our control which may prevent us from securing a reasonable recovery for our clients (and a fee/cost reimbursement for our firm).

For example, very large verdicts are not always collectible. Sometimes, they're set aside. They are often appealed. Judges frequently reduce them. Other times, a verdict might cause a defendant to be insolvent and unable to pay. And sometimes, states' caps on punitive damages render a large punitive-damages award purely ceremonial.

This means we need to keep an open mind about the value of a case even as we ramp up for trial. We need to be monitoring trial costs as they pile up. You already know you'll be paying thousands of dollars or tens of thousands of dollars for expert witnesses. But don't forget about the $20,000 for a jury consultant. Or the tens of thousands of dollars more for a court reporter and transcripts. Or the additional thousands of dollars for audio-visual support.

As we get ready for trial, we must objectively determine the best-case scenario at trial, the worst-case scenario, and what a likely outcome could be. How do those numbers measure up against our expenses to date? Based on our budget, do they leave us room to continue to invest in the case?

Of course, litigators and trial attorneys can bring some certainty into the cost/benefit analysis by entering a high/low agreement with opposing counsel. Besides guaranteeing their client a recovery of at least the low number, both the low and high numbers provide dollar amounts attorneys can benchmark their expected expenses against to determine whether certain additional expenses are worth investing in based on how much room there is for their client's potential recovery to

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increase within the terms of the agreement.

Zealously advocating for your clients should not bankrupt you and your firm

The financial concerns that arise in litigating our cases are not theoretical. I know of a firm that spent large sums of money to secure an eight-figure verdict it could not collect. Then, the firm lost a big trial for which it had invested a similarly large sum of money. The next thing its equity partners knew, the firm and its principals were on the verge of insolvency.

Like baseball players, as trial lawyers we like to swing for the fences. And just like those baseball players, some of our at-bats – our clients' cases – result in strikeouts. When baseball players strike out too much, their batting averages dip and they hear boos from their hometown fans. But when consumer attorneys do so, they risk putting themselves out of business.

For this reason, I've done my best as the managing partner at my firm to instill a culture of financial intelligence regarding managing our clients' cases. As an example, we recently settled a case for eight figures after two weeks of trial but before closing arguments. The expenses for that case were $640,000. Rather than deal with years of appeals and an uncertain outcome, our client made the wise decision to accept the settlement, rather than continue to roll the dice. It so happens that it was a wise decision for our firm as well.

As Kenny Rogers famously sang, "You got to know when to hold 'em, know when to fold 'em, know when to walk away, and know when to run." When attorneys take a business-minded approach to their cases by regularly evaluating the value of those cases and monitoring their expenses that are tied up in them, they can ensure those cases resolve successfully for their clients and their law firms. Most times, having cash in hand in the form of a settlement is better than chasing a verdict. But without knowing a case's numbers and understanding how much more value can be unlocked for a client, the advice an attorney gives a client regarding this decision may be clouded by uncertainty or ignorance.

Attorneys who regularly take a business-minded approach to litigating their clients' cases should be able to build stable, profitable law firms that will allow them to continue to fight the good fight for their clients and continue to take on even bigger and deeper-pocketed defendants.

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