

Litigation in the Year 2000 and Beyond -- What Lies Ahead?

06.10.1998

BACKGROUND NOTE:

Having been a business litigator in Los Angeles for 32 years, I have observed and experienced three decades of dramatic changes in the litigation process and have seen the pendulum swing from one extreme to the other. This phenomenon has led me to ponder questions which surely are in the forefront of corporate counsel's thinking as we prepare to enter the 21st century -- what will litigation be like in the year 2000 and beyond? Where are we headed and what can we expect?

Much has been written about the many changes and innovations in litigation during the past several years. In order to predict what lies ahead, however, we should examine and learn from our experiences and from the events of the past. In this brief article I will attempt to highlight certain significant aspects of "the litigation process" in the 1970's, 1980's and 1990's which may help us predict what lies ahead.

THE 1970's:

Business litigation during the 1970's was fairly routine and normally conducted "by the book." Corporate counsel retained outside law firms -- often the same firm for most of a client's cases -- and generally gave the law firm carte blanche to litigate the case with the primary objective of winning. Costs of litigation were definitely secondary in importance to winning the case as a matter of principle. Litigation budgets as we know them today were rarely utilized, and strict oversight or case management by in-house counsel was a rarity. Outside firms were left largely to their own devices in litigating cases and, particularly for defendants in Los Angeles County where the time to trial routinely was four to five years, delay was the name of the game. There was no real premium placed on efficiency and prompt resolution of cases, which predictably led to more billable hours being devoted to cases than necessary and to other "excesses" which substantially added to the cost of litigation.

Although arbitration, particularly through the American Arbitration Association, was sometimes utilized, Alternative Dispute Resolution (ADR) as we know it today was in its infancy. Trial lawyers in law firms earned decent livings, but money was not the driving force for a majority of litigators. Professionalism was the expected norm, and professional satisfaction was of equal importance as financial rewards.

THE 1980's:

The decade of the eighties saw many changes which had profound effects on the litigation process. The advent of modern computers and other advances in technology provided a competitive edge to law firms which recognized early on that litigation could be streamlined through the effective use of the new technology. Largely spurred by outside influences such as *The American Lawyer*, the legal profession increasingly became viewed

as a business rather than as a profession, and the success of a lawyer began to be measured by his/her annual compensation rather than by the achievement of effective results. As many eastern law firms opened offices in Los Angeles, many litigation partners in Los Angeles law firms defected to the branch offices of the eastern firms for the promise of more money.

More billable hours led to larger profits, and law firm associates came under increasing pressure to bill more hours to help pay their increasingly high salaries. As long as corporate in-house counsel did not impose strict cost control and budgets on their outside firms, litigation excesses thrived and, regrettably, some law firms abused the trust which their clients had bestowed upon them often resulting in massive litigation costs.

Technology advances, although increasing efficiency, led to new charges which were passed on to clients often with premiums attached. Law firms grew in geometric proportions largely fueled by an increase in litigation. It was only a matter of time before the pendulum was to swing the other way.

The late 1980's also saw other phenomena which had profound effects on the litigation process. The formation of JAMS and other similar organizations had begun to focus more attention on ADR as an effective method of resolving disputes. Unfortunately, however, use of ADR, more often than not, was a last resort usually utilized after years of expensive litigation.

The increasing pressures within law firms to increase billable hours and thus profits inevitably caused a number of law firm partners, including litigators, to become disenchanted with the private law firm practice and to seek new positions, including in-house corporate department positions overseeing litigation. Armed with the knowledge of how many law firms handled litigation, this new generation of in-house litigation counsel began to put the brakes on uncontrolled litigation costs. Budget requirements and expense guidelines became increasingly popular with clients retaining outside counsel to handle their litigation. Beauty contests and marketing techniques began to be utilized in routine fashion for the placement of litigation matters which previously had gone directly to one or more of a client's "regular law firms." Clients began to hire specific lawyers, rather than the law firm, to handle their specialized litigation matters.

ENTER THE 1990's:

The recession of the early 1990's brought about still other significant changes in the litigation arena. Clients had now become extremely cost conscious and fat litigation budgets were an obvious target for reduction. Litigation for the sake of winning on principle without regard to the cost became the exception – not the rule. Resolution of a lawsuit became a business decision with a bottom-line impact, and early resolution of cases was an obvious way to minimize litigation costs. Many law firms were caught by surprise. Early resolution of cases inevitably resulted in a reduction of billable hours spent by litigators, which slowed the ever-increasing demand for new young litigators.

ADR really began to flourish. Many excellent judges recognized the opportunity for "new careers" as independent arbitrators, mediators and settlement judges and opted to leave the bench at early ages to capitalize on this new lucrative career path. This exodus from the bench is continuing at an alarming rate, depleting the court of many of its finest judges. New technology continues to revolutionize the litigation process. Document imaging, video conferencing, computer graphics, instantaneous e-mail, the Internet and other sophisticated gadgets and devices are reducing the demand for endless associates and paralegals to staff cases which previously required intensive staffing.

Although much good has emerged from these revolutionary changes, the public image of lawyers -- and litigators in particular -- has regrettably deteriorated. Civility among opposing attorneys and good-old-fashioned "professionalism" has unfortunately sunk to a low point. Many lawyers are questioning and second guessing their career choices, and some are opting for alternative lifestyles. But litigation continues to thrive despite the many changes. What can we expect next?

THE YEAR 2000 AND BEYOND

The lessons of the past three decades lead me to foresee a brighter future for the litigation process. Clients' increasing insistence on cost-effective, early resolution of most cases will have the beneficial effect of forcing the law firm business litigator to become more of a problem solver and less of a street fighter. The successful commercial litigators will be those who develop strong ties with corporate clients by demonstrating their ability to understand the "business problem(s)" and contribute to an early and cost-effective resolution of the dispute. Although there will always be the large, hotly contested and staggeringly expensive lawsuits, these will most likely not dominate the litigation scene in the next decade.

As more clients turn to ADR as the preferred method of dispute resolution, the litigators who possess the skills of effective negotiation and who conduct themselves professionally while still acting as strong advocates for their clients' positions will be the most sought after and successful attorneys as we enter the next century.

The keys to success for the business litigator in the next decade and beyond will include the following:

- (1) The ability to understand and appreciate the "business problems" presented by a lawsuit;
- (2) The ability to evaluate a case at its early stages and before incurring hundreds of thousands of dollars in litigation costs;
- (3) Creativity -- the ability to come up with innovative solutions to minimize the litigation risks while working toward a business solution to the problem;
- (4) Professionalism and people skills, including the ability to communicate effectively with business executives and in-house litigation counsel as well as dealing professionally with the opposing side of a case;
- (5) Efficiency -- i.e., getting the job done properly in the least amount of time and for the lowest effective cost; and
- (6) A firm grasp of the newest technological advances both for case management and for possible use at trial.

The successful law firms will be those which train their younger litigators in these essential skills and which are able to retain their best attorneys in these increasingly competitive times.

For in-house litigation counsel, a key attribute will be the ability to effectively balance cost vs. benefit and to reach agreement with outside counsel on the scope of the litigation effort (i.e., a "Cadillac vs. Chevrolet approach"). There will be no substitute for effective teamwork between in-house and outside litigation counsel.

Will all or a substantial part of this really become a reality? I believe it will, in large measure because of the economic reality facing most corporate clients and the intense competitive pressure on law firms to become more innovative, efficient and responsive to clients' business needs. If in fact much of this does materialize, it

will be a "win-win" situation for both lawyers and clients, and, best of all, the public image of litigators may actually improve. The year 2000 is just around the corner!

This article was originally published as a Litigation and Antitrust Update (June 1996), a Sheppard, Mullin, Richter & Hampton LLP publication.

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Practice Areas

Litigation