

PROPER MANAGEMENT, NOT COURTS CAN BEST CONTROL LITIGATION COSTS

by
Lawrence A. Salibra, II

Many commentators have offered various explanations why disputes should be resolved by some means other than litigation. For many years, Alternative Dispute Resolution (“ADR”) was in vogue and offered the promise of lower cost, alternative remedies and confidentiality. Although offering creative alternatives not available through traditional litigation as well as confidentiality, ADR has been less effective in delivering relief from litigation costs. Moreover, ADR has never become nor could it become the replacement for traditional litigation that many had once hoped. The result has been that the debate about the value of litigation and how to accomplish it cost-effectively has continued largely unabated as commentators have continued to suggest methods to solve the cost issue which many perceived to be an inherent part of the process.

One commentator, attorney Howard Scher, recently addressed this issue advocating the virtues of litigation as a preferable solution to many disputes and the use of “rocket docketts” as an external control on costs. See Howard Scher, *Trials in “Rocket Docketts”: More Than Just a Legal Strategy*, Washington Legal Foundation LEGAL OPINION LETTER, Oct. 17, 2003 (available at <http://www.wlf.org/upload/10-17-03sher.pdf>).

The commentary is correct with regards to the value of litigation. First, in some areas, such as disputes on the constitutionality of a tax, litigation is the only alternative. Similarly, as a corporate defendant sued by private plaintiffs, the consent needed for ADR is usually not available. Second, conventional litigation may be the method of dispute resolution of choice. The deterrent effect of a series of favorable jury verdicts cannot be overestimated. Moreover, the preclusive effect of prior litigation either on factual issues or the precedential impact of key legal doctrines can have huge beneficial impact that ADR simply is incapable of delivering. If a plaintiff perceives his adversary as someone who will stay the course through trial and the appellate process, and that the precedential consequences of the outcome could adversely affect the potential settlement value of future claims with other parties, he will find other targets more attractive.

The article is also on point with its expressed concern about the importance that cost plays in litigation. However, it is not at all clear that lawyers extend the time required to reach effective litigation preparation as a function of natural, immutable characteristic of human nature. There are also serious concerns regarding abdicating substantial control over litigation preparation to the rigors of a court process that may be largely insensitive to the needs of the litigants other than the resolution of the

lawsuit. Companies have many needs to fulfill and forcing oneself into a process that requires that the ends of the litigation become paramount over everything else is troublesome. Finally, forcing your lawyer into a jurisdiction that might on other criteria be disadvantageous because neither the inside counsel nor the outside lawyers are capable of effectively evaluating and managing the litigation without external restraint is a questionable management technique.

The underlying issues require a monumental change in the way lawyers approach a solution to a legal problem, whether it be a lawsuit or any other legal issue. A lawyer's work should not be concluded when some artificial restraint imposes an end to his efforts, but when he reaches the realization that cost of any further effort does not justify the benefit his client will receive. This simple premise may seem obvious, but it is antithetical to a professional, educational paradigm in which process is paramount without relevance to the product produced. Solutions to legal problems are not taught. Students are not measured by the quality of their legal analysis or for finding economic or engineering solutions that can mollify the severity or eliminate the legal issue. Instead, the number of legal issues identified without reference to actual relevance or to how arcane is rewarded as the standard of legal excellence.

Suggesting that a fundamental change in legal education is the solution may be dismissed by many as correct but impractical, at least in the near term. Such skepticism is justifiable. But this training is not something within the sole province of law schools. If a market existed such training would become available to meet the market demand. The problem is that the demand does not exist.

In-house counsel are often ineffective when defining whether a litigation strategy is efficient or correct, as Mr. Scher argues in his paper. However, it is not because their training as business lawyers does not provide them with adequate skills. Many in-house litigation managers have had trial experience in outside firms and their record of performance is no better. The problem is that many in-house lawyers are simply not buying effective litigation strategy from their outside counsel — and many outside counsel are not selling it. What they are buying is a form of prestige by association that they do not have in their present jobs.

Second, in-house counsel are often buying immunity from accountability. By not effectively directing their outside attorneys, many in-house counsels' objective is to transfer accountability for an adverse outcome to the outside firm. This uneasy relationship between inside and outside counsel has been a constant source of irritation. Settlement rather than litigation to verdict has benefits for both sides in this uneasy balancing act — each can point to the other as the source of the result and technically speaking, no one ever loses. The outside lawyer points out that the client forced him to settle a case he really wanted to try and the inside lawyer can point to the costs of the outside firm as the primary reason a litigated result is impractical.

These forces driving litigation tactics are systemic and imbedded in the perceived institutional needs and capabilities of the key actors in the system. It is not likely that something so entrenched is going to be remedied by something as simple as judges' imposing of procedural rules on litigants, and certainly not without the risk of potentially serious side effects.

Ultimately, the answer lies in the hands of the business managers of the corporations who must decide that they are going to take litigation management as seriously as they manage their energy costs. Only then will fundamental change occur. Until then proposed solutions whose premise is that one should look beyond the behavior of the key players for a solution to the management vacuum will continue to surface.