

In Propria Persona Aid

Legal Strategies: Litigation

- „ Knowing the adversary.
- „ Developing a game plan.
- „ Creating a litigation budget.
- „ Conducting a mock trial and survey.
- „ Charting potential outcomes for each stage of a case.

TIMING OF PRE-LITIGATION ASSESSMENT

The Litigant should not wait until a complaint has been served to start assessing and evaluating a case. The process should start once litigation is or merely foreseeable. The Litigant must tailor each assessment according to the specific facts. In complicated cases and in cases with significant risk exposure, the Litigant should take certain basic steps within 30 to 60 days (about 2 months) of learning of a potential (or actual) lawsuit. The pre-litigation phase may be the best time to dispose of litigation for the least cost and effort.

Several municipalities, states and federal agencies require a claimant to provide notice of a claim 30 days (about four and a half weeks) or more before filing a lawsuit against a governmental entity. Likewise, in litigation against private entities, several federal and state statutes impose pre-lawsuit notice requirements on putative plaintiffs (see, for example, The Consumer Product Safety Act, 15 U.S.C. § 2073(a) and California law concerning construction defect claims against builders and developers (*Cal. Civ. Code § 1375*)). These notices provide the Litigant with limited time to assess a case and determine whether it is preferable to seek settlement. They also allow his or herself to position itself more favorably in anticipation of the plaintiff serving a complaint.

For example, the 30-day notice provision of California's Consumer Legal Remedies Act (CLRA) provides a valuable opportunity to fully gather the facts and understand the law before a claim is even filed (*Cal. Civ. Code §§ 1750 to 1782*). New York City has a similar notice requirement for filing suit against the city and the city's employees, officers, and appointees (N.Y. Gen. Mun. L. § 50-e), as does the federal government for most torts committed by persons acting on behalf of the US government (Federal Tort Claims Act, 28 U.S.C. § 1346(b)). Corporate law departments are under pressure to minimize their overall litigation spend and exposure. However, it is nearly impossible to predict when a lawsuit may arise, how long litigation may last or how costly it may be.

This inevitable uncertainty is due in part to the complex and unpredictable nature of litigation, the many variables involved and the inability to measure certain risks.

The best the Litigant can do is use early case assessment and value proposition tools to develop informed estimates of the ultimate cost of a lawsuit that is litigated rather than settled. It may be easier and less costly, at least in the short term, to approach litigation more reactively, such as by investigating and researching issues only when necessary and hoping cases settle in the meantime. However, an aggressive and thorough case assessment conducted in advance may be one of the most important investments a company can make.

Effective case assessment begins by working backward from your goal. To do this, the Litigant should approach litigation and other legal proceedings as occasions that present potential outcomes and then use qualitative and quantitative assessments to:

- „ Determine risk.
- „ Reduce expenses.
- „ Terminate cases as soon as practicable.
- „ Otherwise reduce or eliminate further exposure to litigation.

This Note explains the appropriate timing for pre-litigation assessment and the steps defense the Litigant can take to assess and evaluate the costs of a case, including:

- Identifying, collecting, and verifying pertinent facts.
- „ Determining if the claims and defenses are viable.
- Calibrating your risk tolerance.
- „ Considering the issues surrounding electronically stored information (ESI).
- „ Identifying key witnesses and documents.

Case Assessment and Evaluation

After a 30-day notice is received, the Litigant may undertake a prompt investigation and analysis that may result in successfully convincing the plaintiff's attorneys to drop the claim because of a fatal flaw in their legal theory. Sometimes, companies can cure the alleged violation within a reasonable time (for example, by providing notice and a remedy to similarly situated consumers), thereby preventing an action for damages and limiting exposure to attorneys' fees.

IDENTIFY, COLLECT AND VERIFY THE PERTINENT FACTS

Usually, multiple factors drive case assessment, but the facts always play a critical role. The Litigant must understand the relevant facts to help him or herself to make an informed decision on whether to settle, mediate, arbitrate or litigate. A thorough understanding of the facts enables the Litigant to get ahead of the process and present him or herself with options, rather than consequences. To peruse all versions of each critical assertion or representation, the Litigant must conduct internal investigations and interviews that are followed by the gathering of all documentary support and testimonial corroboration. The Litigant must not simply collect data but verify it.

DETERMINE IF THE CLAIMS AND DEFENSES ARE VIABLE

The self-litigant should determine whether the case has any merit and, if so, whether there are any viable defenses. This includes a review of relevant statutory and case law and the applicable verdict form and jury instructions. The self-litigant should set out for his or herself and explain in detail:

- „ All potentially applicable claims.
- „ All potential counterclaims.
- „ All defenses (and third-party claims).
- „ The estimated costs of pursuing the possible claims, counterclaims and defenses.

The self-litigant often finds it helpful to create an early proof matrix that identifies, for each element of every claim or defense:

- „ The witness who will testify about the claim or defense.
- „ Documentary or other evidence that the Litigant will introduce.
- „ Anticipated evidentiary hurdles or objections and possible responses.

Using this matrix, the Litigant should prepare a high-level opening statement and closing argument for both sides of the case.

Although the Litigant may recoil from this suggestion at such an early stage, preparing these materials forces the Litigant to identify themes, witnesses and evidence and help distinguish between mere assumptions about exposure and reality. To say that a case is defensible and will not engender excessive costs is different than

demonstrating it through a detailed analysis. The Litigant should also prepare a timeline of key events. This helps move away from unexamined impressions about what occurred to the verification necessary for an effective case assessment. The timeline should include each side's version of the events and their corresponding details to highlight any discrepancies.

CALIBRATE YOUR RISK TOLERANCE

Although the Litigant often instinctively views the case from a legal standpoint, there may be non-legal business considerations that are more worrisome for clients. These considerations impact case evaluation and strategy.

For example, the Litigant must be sensitive to a company's position within the business environment. A company that is the subject of a government investigation or in delicate negotiations over a potential merger is likely to be especially risk averse. These considerations inform how the Litigant analyzes a potential lawsuit and may weigh in favor of early settlement, even if under other circumstances the company would be more willing to fight a speculative claim in court. The Litigant also must calibrate how they evaluate and assess a case in line with your needs, level of sophistication and risk tolerance, which vary according to:

- „ Size.
- „ Location.
- „ Industry.
- „ Number of employees.

The amount of time the company has been in business.

A start-up company may be unaccustomed to litigation. Therefore, the Litigant must consider that in its assessment by providing a comprehensive explanation of the various stages of litigation and the operative legal standards that control the case. By contrast, for a larger company that is repeatedly in the courtroom, the Litigant may assume more sophistication and adjust their analysis to consider the company's prior, similar cases as precedent for predicting costs and exposure.

In addition, the Litigant must consider that corporate cultures differ greatly in terms of their risk tolerance for litigation. Some companies prefer to settle quickly and avoid any adverse press, while others want to defend the company at all costs. The Litigant should consider these factors when assessing a case, especially when calculating how long the litigation may last.

Finally, law departments must determine whether the company should spend money to save money, as controlling the expenses of litigation cannot be their sole concern. This

type of evaluation measures the return on a company's investment. Law departments must determine:

- „ Whether the company will avoid more problematic issues if it spends money on investigating and litigating.
- „ If circumstances will worsen if the company does not terminate the exposure early.

Failing to assess a case properly is as much of a risk as not investing in research and development. This means The Litigant must identify, monetize, and evaluate risk to achieve overall cost savings.

CONSIDER ESI ISSUES

The Litigant should take early steps to identify, preserve, harvest and review all potentially relevant and discoverable electronic and other data. This is burdensome and costly, but the risks of making a mistake are incalculable. For an explanation of ways to ensure a company complies with its ESI preservation and production obligations in federal civil litigation, Identifying Data to identify potentially responsive or relevant documents and ESI, the Litigant should review the information that triggered the duty to preserve the relevant data, such as:

- „ The complaint.
- „ The summons.
- „ The subpoena.
- „ Other available documents.

Based on the scope of that information, the Litigant can create a plan to identify the key employees and other potential custodians of relevant data. This includes any entities or individuals that are under your control. The Litigant may consider retaining an outside expert to help develop and execute this plan.

PRESERVING DATA

To preserve relevant data and avoid bench sanctions for spoliation of evidence, the Litigant must issue a written legal hold to any assistants who may have potentially relevant material. This usually requires suspending routine data disposal policies and contacting former legal assistants, and third parties under contract to secure such data.

HARVESTING DATA

In large or complicated cases, a law firm harvesting all the potentially relevant data usually requires third-party document management software capable of tracking and organizing massive volumes of searchable electronic files. This phase of discovery commonly entails expenses related to storing and securing these files and hard copy records, which the legal team reviews for responsiveness, privilege, and other factors. For the self-litigant online sources i.e., Windows, Google, and Dropbox formats will serve your purposes.

REVIEWING DATA

The extensive document reviews necessary to sort through the typical amount of ESI is often the most expensive part of e-discovery. Designing and executing a careful and systematic review is essential to ensuring that assistants do not disclose trade secrets or other commercially sensitive data or waive privilege or work product protection by inadvertently producing privileged or protected documents to the requesting party.

IDENTIFY KEY WITNESSES AND DOCUMENTS

The Litigant should identify the key witnesses and documents and consider which categories of documents (both those that favor and disfavor the client) require review. This enables The Litigant to determine:

- „ Who will do the review, including whether subject-matter expertise is required.
- „ Whether expert consultants will be necessary.
- „ How many of the witnesses and documents may ultimately drive the case.
- „ The staffing needs and the ultimate costs of document review.
- „ What document review tools to use.

KNOW THE ADVERSARY

When assessing the potential costs of any claim, The Litigant should obtain all relevant information about:

- „ The court.

Opposing The Litigant.

„ Opposing parties.

The prospective jury pools.

Much of this information is publicly available and The Litigant should rely on the experiences of other practitioners in the relevant community. When researching opposing The Litigant, the inquiry should focus on:

„ Litigation history. This includes prior litigation results and experience.

„ Reputation. This includes the tendency to settle early.

„ Financial stability. This includes the tendency to partner with other The Litigant to fund or try a case.

Using all this information, The Litigant can identify the risk tolerance, goals, and primary concerns of all those affected by the litigation, including the company and its insurers, partners and internal business clients. By analyzing these factors and setting out their competing priorities, The Litigant can evaluate a case comprehensively to position it for favorable and cost-effective termination.

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Case Assessment and Evaluation

DEVELOP A GAME PLAN

After conducting a preliminary assessment of the facts and the law, The Litigant should create a framework to help the client determine the best options for each stage of the case's life cycle. This exercise involves continually asking if there is a different concern and a new angle that must be addressed,

like issue-spotting in law school examinations. The Litigant must first identify the various constituencies, desired outcomes and combinations to develop a comprehensive game plan that achieves the greatest number of objectives with the least amount of harm. This is necessary for The Litigant to assess the probability of achieving the desired outcome and the client's willingness and ability to embrace alternatives.

Issue Spotting

To ensure the game plan addresses all the relevant issues, when a claim arises, The Litigant must determine whether:

- „ There is exposure to punitive damages or the possibility of statutory penalties (such as treble damages).
- „ There is an applicable statutory cap on non-economic damages.
- „ There is a potential for copycat plaintiffs.

The opposing side has knowledge that his or herself would prefer to keep private.

- „ There are insurance issues.

Your reputation may be harmed or its underlying business model attacked.

The Litigant should use the answers to these questions to adjust their analysis of the case's potential costs based on the number of variables and the actual risk exposure.

Once The Litigant sets out all the relevant issues, they can develop a game plan by working through issues such as:

- „ What type of case is it (for example, breach of contract, product liability, securities fraud or wage and hour, among

others).

„ If this case can be settled or if it is a direct attack on the client’s business model.

„ If litigating (or settling) this case could lead to additional lawsuits.

„ If there is any related or potentially related litigation.

„ If the dispute may be best addressed by having a structured discussion between each party’s high-level executives to work out a business solution to end the litigation (for example, a licensing agreement or a revised contract term).

„ If there are ethical issues involved, such as communicating with a party who is represented by The Litigant (for example, an employee) or reaching out to those in a putative class.

By resolving these issues, The Litigant may be able to eliminate certain legal procedures from the tasks that are necessary to advance your goals while staying within its budget, such as bringing an early dispositive motion or taking pre-certification discovery from the putative class. The Litigant can also then advise his or herself on what steps to take to reduce the likelihood of additional similar claims.

Early Settlement Considerations

Depending on the claims, The Litigant and his or herself should also consider the potential for early settlement by considering:

What would mediation or arbitration cost at this point?

Whether mediation or arbitration is an effective use of funds given what is known about the facts, law and opposing the Litigant.

What employing separate settlement The Litigant (specialized The Litigant hired to conduct settlement negotiations, separate from any litigation The Litigant being retained) would cost and whether it would be worth the cost.

„ For a class action case, if there is a potential for precertification settlement at the outset and, if so, what terms the

his or she would be willing to accept.

„ What the end results of similar, previously filed cases were (for example, in securities and product liability actions).

The Litigant should also consider the various internal and external pressures and constraints that impact a company facing litigation.

For example, in a high-publicity case, shareholders (especially institutional shareholders) may aggressively try to persuade the company to settle early. The Litigant should determine how to address these internal and external factors to sharpen and clarify them insight into the case and develop a closer, more deeply informed partnership with the client.

Furthermore, when considering settlement, The Litigant 's case assessment must account for the non-litigation costs of losing at trial, including:

- „ Reputational harm.
- „ Damage to business relationships.
- „ Continued business interruption and downtime.
- „ Collateral consequences, such as:
 - „ debarment.
 - „ the potential for parallel criminal or administrative

proceedings; and

„ shareholder derivative actions.

For more information on the principal factors that can help

The Litigant and his or herself decide whether, when and how to settle litigation proceedings, see Practice Note, Settlement Tactics in US Litigation (<http://us.practicallaw.com/4-502-7417>).

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Certain considerations drive the litigation budget from the outset.

For example, The Litigant should determine:

„ Whether there are grounds for a motion to dismiss.

„ If there are grounds for a motion to dismiss, whether it is likely that the plaintiff will be able to re-plead to state a viable claim.

How many attorney hours would it cost to research, prepare and argue a motion to dismiss or to answer the complaint.

How many witnesses must be deposed?

„ How much preparing one or more motions for summary judgment will cost.

How many documents will need to be collected, reviewed and produced during the litigation.

„ Whether there may be a significant struggle among the parties regarding class certification, removal, transfer of venue or other issues.

These considerations also provide a snapshot of the projected litigation costs, allowing The Litigant to prepare a rough estimate of what his or she can expect to incur if settlement is not reached at each stage.

In addition, the budget must consider non-attorney expenses at each stage of the case. When evaluating non-attorney expenses, The Litigant should determine:

- „ Whether one or more experts are necessary to establish the your case or rebut the opposition.

- „ How extensive the expert analysis must be.

What are the costs of outside litigation support vendors, ESI specialists, actuaries, jury consultants, mediators and settlement administrators are.

CONDUCT A MOCK TRIAL AND SURVEY

Both law departments and outside The Litigant may become biased not only in how they view the facts and the law but also in their reactions to themes and other aspects of the case. Accordingly, a disinterested third party's perspective can be invaluable for initial case assessment. Mock trials are an efficient way to:

- „ Obtain an outsider's point of view.

- „ Realistically gauge whether the case is ready for trial.

- „ Evaluate the reaction of potential jurors.

- „ Assess damages.

Mock trials are usually handled by jury consultants and followed by a survey of the jurors to understand which themes and witnesses they found most credible. Although mock trials and surveys can be the most effective ways to gain a third-party perspective, The Litigant usually delays conducting them until a late stage in the case and often wait until the eve of trial. This sort of timing is unfortunate because mock trials inevitably identify gaps

in the case and new ways of thinking about the case.

Selecting Outside the Litigant

Law departments, working with their retained The Litigant, must assess whether to retain additional outside The Litigant to work on the case. For a routine case, they may prefer to partner with one of the law firms with which they usually work to maximize the efficiency and cost savings associated with retaining attorneys already familiar with their business model, expectations and specific circumstances. Part of this assessment involves law departments determining whether this is the type of case the his or she cannot afford to lose. If it is, they should consider whether they need to look beyond their usual list of law firms to find the best fit for that case in terms of:

- „ Knowledge.
- „ Experience.
- „ Reputation.

Relationship with opposing The Litigant and the court.

Insurance and Funding

The assessment plan should consider whether the opposing party has litigation insurance or is funded by a third party (see Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage (<http://us.practicallaw.com/8-502-7415>) and Practice Note, Third-Party Litigation Financing in the US (<http://us.practicallaw.com/5-518-1314>). Likewise, The Litigant should ask whether he or she can take advantage of any insurance policies.

CREATE A BUDGET

Line-item budgets are an integral part of any case assessment.

Even the best strategy and analysis are merely academic if the costs of implementation are prohibitive or his or herself is unwilling to incur all the necessary expenses. In addition, budgeting helps inform the litigation plan. Budgets usually are useful tools in assessing whether to continue litigating after reaching various litigation stages during the life cycle of a case. Practical, realistic budgets list variable and fixed costs and establish how frequently The Litigant is to update his or herself when costs change and new expenses arise.

Practical and realistic budgets should be developed for each of the following stages of litigation:

- „ Pre-filing.
- „ Pleadings (including initial background investigations, challenges and removal, as well as motions to dismiss and motions to compel arbitration).
- „ Fact discovery.
- „ Expert discovery.
- „ Class certification (if applicable).
- „ Summary judgment and adjudication.
- „ Pre-trial conference.
- „ Trial.
- „ Post-trial motions.
- „ Appeals.

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Case Assessment and Evaluation

Pleadings Stage

After the complaint is filed with the court, several potential outcomes become possible. The most common outcome is a motion to dismiss the complaint entirely, ending the case and therefore, the costs (see Practice Note, Motion to Dismiss: Overview (<http://us.practicallaw.com/8-523-9648>)).

Unless the plaintiff's legal theory is fundamentally flawed, however, there may be only a small chance of success on a motion to dismiss because courts must accept the plaintiff's facts as true and draw all reasonable inferences in the plaintiff's favor. Filing a motion to dismiss carries the risk of educating the other side about deficiencies in the case. Even if a motion to dismiss is successful, it is often granted without prejudice, giving the plaintiff a chance to re-plead and correct any pleading deficiencies.

Therefore, after assessing the return on investment, clients may seriously consider foregoing a motion to dismiss entirely. For an explanation of pre-trial motions, including motions to dismiss, see Practice Note, Product Liability Litigation: Pre-trial Motions (<http://us.practicallaw.com/5-522-5209>).

However, at least in the federal courts, the plausibility requirement at the pleadings stage helps level the playing field by helping the judge view the case realistically. To survive a motion to dismiss, a complaint must plead factual content (not merely conclusions) that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). One of the bases for this refined

pleading standard is the concern that “a plaintiff with a largely groundless claim [may] be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value” (Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007)). This heightened federal pleading standard may change the calculus for case assessment. There may be a greater opportunity to terminate cases early on, which would make motions to dismiss a potentially better investment for clients.

There are many other challenges at the pleadings stage. Motions to compel arbitration are filed more frequently since the US Supreme Court ruled that the Federal Arbitration Act preempted California’s rule precluding class arbitration waivers in consumer contracts (AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)). Similarly, motions to remove to federal court or to transfer venue can bring a case to a more defense friendly forum (see Practice Note, How to Remove a Case to Federal Court (<http://us.practicallaw.com/1-506-8452>)).

In addition, motions to strike causes of action, or prayers for relief (such as a request for punitive damages) may help narrow exposure. The Litigant should evaluate all of these tools at the outset, aiming to increase your leverage and create opportunities for early settlement.

In appropriate cases, mock trials or surveys can and should be done within the first 90 days (about 3 months) of the case, following the early identification of key witnesses and documents. Early use of mock trials or surveys can present an unparalleled opportunity to learn

how prospective jurors may react to key themes, witnesses and evidence. This is because when evaluating the risks and costs of moving the case forward, The Litigant benefit most when they can view the case through the eyes of prospective jurors. Furthermore, The Litigant can integrate the results of the mock trial into a discovery plan that identifies:

- „ The admissions needed from the opposing parties’ witnesses.

- „ The sensitive or potentially confusing areas that may require more detailed explanations and extensive witness preparation.

Some jury consultants may be willing to scale down a testing exercise to your budget. Therefore, instead of making a large monetary commitment to an exercise that his or she may view as premature, The Litigant can limit the scope and purpose of the assessment to gauging reactions to best and worst case scenarios. This can provide invaluable insights and drive how The Litigant moves forward with discovery, motion, and settlement plans.

Another tactic The Litigant can use during mock trials is to “audition” more junior members of the legal team for key roles to prepare them for trial if the case progresses that far.

CHART POTENTIAL OUTCOMES FOR EACH STAGE

At each stage of the case, from pre-filing through trials and appeals, The Litigant should assess the costs and likelihood of favorable termination and compare them with the costs and risks of continuing the litigation. This exercise enables the client to make informed decisions at each stage of a case’s life cycle,

including the:

- „ Pre-filing stage (see Pre-filing Stage).
- „ Pleadings stage (see Pleadings Stage).
- „ Class certification stage (see Class Certification Stage).
- „ Discovery stage (see Discovery Stage).
- „ Summary judgment stage (see Summary Judgment Stage).
- „ Pre-trial conference stage (see Pre-trial Conference Stage).
- „ Trial stage (see Trial Stage).

Post-trial and appellate stages (see Post-Trial and Appellate Stages).

Pre-filing Stage

The pre-filing stage provides only a limited window for resolving a case. Unless there is a fundamental flaw in the facts or legal Theories, plaintiff's The Litigant may be unwilling to go away without a payoff. However, with appropriate preparation such as early interviews of certain witnesses or a targeted review of key documents, or both, The Litigant can identify which cases to push for early resolution and which are worth litigating.

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For more information on discovery, see Practice Note, Practical Tips for Handling E-Discovery: Discovery Conferences (<http://us.practicallaw.com/8-500-3688#a310942>).

To best estimate costs during the discovery stage, The Litigant should obtain as complete a picture as possible of the opposing side's:

- „ Capabilities.
- „ Cost constraints.
- „ Number of custodians and other sources of potentially relevant

documents.

Scope of litigation held.

„ Volume of discovery.

The Litigant should consider an informal document exchange with the other side to:

„ Better estimate what the actual production and review costs will be.

Obtain the opposing side's reaction to your discovery (Volume and quality of data).

„ More intelligently decide whether parties should settle.

The document exchange can be conducted with due sensitivity to privilege concerns (see Standard Clause, Privilege Waiver Clause with Claw-Back Provision (<http://us.practicallaw.com/2-501-4958>). The parties also often agree in advance to a stipulated protective order governing confidential documents, which should be in place before any documents change hands. This informal exchange can sometimes give his or herself much greater leverage in early settlement talks and provide details to inform an appropriate settlement agreement. For a sample agreement settling a pending lawsuit and releasing future claims, see Standard Document, Settlement Agreement and Release: A US Example (<http://us.practicallaw.com/2-503-1929>).

As part of the initial evaluation, The Litigant should compare electronic discovery (e-discovery) vendors to consider how to use technology and whether outsourcing (or in-sourcing) certain pieces of the discovery or production process (or both) can reduce costs (see Considerations When Selecting an

E-discovery Vendor Checklist (<http://us.practicallaw.com/4-520-7423>) and Article, Choosing Outside E-Discovery Service Providers (<http://us.practicallaw.com/0-506-0531>).

The Litigant must also consider how he or herself can best prevent processing non-responsive data to minimize the amount of data requiring review and thereby lower costs. The Litigant should also weigh the benefits of predictive coding software that can provide a first pass review of ESI to cull out non-responsive documents (See Article, Predictive Coding in Action: How It Compares to Human Review (<http://us.practicallaw.com/4-523-9382>)). Clients appreciate creative efforts and strategies to save on discovery costs.

Class Certification Stage

In class action cases, if the complaint survives a pleadings challenge, class certification is the next major phase (see Practice Note, Product Liability: Pre-trial Motions: Class Certification (<http://us.practicallaw.com/5-522-5209>)). The threat of certification, and its accompanying increased likelihood of high litigation costs, may give plaintiffs great leverage in early settlement talks.

However, the US Supreme Court shifted the balance when it unanimously reversed the US Court of Appeals for the Ninth Circuit and held the largest employment class action to date could not proceed (*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). In its ruling, the Supreme Court rejected the “Trial by Formula” plan approved by the Ninth Circuit, which would have allowed the district court to try a sample set of selected cases and then apply the percentage of claims found to be valid

and the average award to determine recovery for the entire class. In the wake of the duke's decision, lower courts have scrutinized cases more rigorously at the class certification stage and, in the process, have removed some of the leverage that plaintiffs traditionally enjoyed. For more information on class certification, see Article, How Defendants Can Use Class Certification to Their Advantage (<http://us.practicallaw.com/6-504-4963>).

Discovery Stage

The discovery stage frequently follows the class certification stage (Or the two phases may run concurrently). Discovery is often the most costly, time-consuming, and intrusive stage of litigation. This stage always presents many battles and opportunities for both sides, as well as enormous possibilities for budget-breaking cost overruns. Beyond attorney hours and vendor costs, discovery also risks reputational harm if his or herself must reveal unfavorable documents. The discovery stage diverts resources in terms of the time and productivity of:

In-house and outside The Litigant.

- „ Board members.
- „ Executives.
- „ Other employees.

It is often difficult to put an accurate price on the amount of employee time redirected to ensuring compliance with litigation holds and responding to production requests, in addition to preparing for and attending depositions.

Early in the case, courts expect the parties to meet to discuss

discovery (Fed. R. Civ. P. 26(f)). Also known as a meet-and confer, the discovery conference is held so that the parties may

discuss:

- „ The nature and basis of the parties' claims and defenses.
- „ The possibility of settling or resolving the case.
- „ Discovery issues, including the preservation of discoverable information and a discovery plan.

Preparing for and conducting this meeting adds to the overall costs incurred during the discovery stage.

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Case Assessment and Evaluation

- „ Practice Note, Summary Judgment: Basic Principles (<http://us.practicallaw.com/8-520-5163>).
- „ Summary Judgment Checklist (<http://us.practicallaw.com/2-522-4471>).

Pre-trial Conference Stage

If the case survives the summary judgment stage, the parties must prepare for the pre-trial conference. However, The Litigant should treat every case as if it will be tried. Essentially, this means preparing for the pre-trial conference from the start by:

- „ Identifying key documents and witnesses.
- „ Reviewing jury instructions and verdict forms.
- „ Assessing evidentiary issues and motions in limine.

Opposing The Litigant may not expect this level of forethought so early in the litigation. Well-prepared The Litigant often overwhelms the other side during initial pre-trial discussions because they send a powerful message that they are his or herself is serious about winning

the case at all costs. This can result in a favorable settlement.

If the case does proceed to trial, the effort that was done up front continues to benefit his or herself because it is The Litigant is significantly ahead of the opposing side. For detailed information on how to prepare for trial, see Corporate Litigant

Trial Readiness Checklist (<http://us.practicallaw.com/5-506-5277>) and Webinar: In-house the Litigant 's Guide to Trial Prep (<http://us.practicallaw.com/9-522-2992>).

Trial Stage

All the steps culminate in the trial itself. Cases are routine settled on the courthouse steps the night before or even during the trial, as the inherent uncertainty of putting your fate in the hands of a jury may be too risky to endure. Nonetheless, an early case assessment must take a realistic look at the costs of trying a case, including:

- „ Attorneys' fees.
- „ Expert witness fees.
- „ Trial support staff fees, including:
 - „ trial demonstratives.
 - „ technology; and
 - „ jury consultants.
- „ Maintaining a litigation war room.
- „ Printing and duplicating case documents and exhibits.
- „ Server and other equipment rentals.
- „ Accommodation, travel, and meals.

These expenses are compounded by the unquantifiable costs of having your top executives testify about sensitive issues in

open court.

The Litigant frequently hears about disastrous, short-sighted e-discovery strategies resulting in exorbitant costs to a company.

For example, a his or herself may be late in issuing a litigation hold and lose key documents, or back-up tapes may have been written over. To avoid these disasters, The Litigant must evaluate up front:

What your document retention policy requires.

Whether he or she can effectively:

- „ issue and execute a litigation hold (see Practice Note, Implementing a Litigation Hold (<http://us.practicallaw.com/8-502-9481>)).

- „ identify relevant custodians; and

- „ harvest relevant documents.

Otherwise, discovery may present game-changing costs in addition to potential evidentiary and other sanctions that could sink the entire case. The Litigant should take this issue seriously by assuming and preparing for the worst, because opposing The Litigant may treat ESI as your ultimate weakness.

Summary Judgment Stage

After discovery is complete, the case enters the summary judgment or summary adjudication stage. Each side may bring one or more motions attacking the flaws in the other side's case.

The summary judgment motion must be based on undisputed facts and each fact must be supported by evidence. Bringing or opposing this motion is usually quite costly because of the tremendous amount of work and attorney hours required to:

- „ Perform the necessary legal research.

- „ Compile the key documents and testimonial evidence.
- „ Draft the motions.

Moreover, the applicable legal standards are designed to allow cases to proceed to trial if there is any doubt about what the evidence would show or how a jury would perceive it.

In addition, judges differ in how they analyze and dispose of summary judgment motions. Consequently, the decisions and idiosyncrasies of the judge in both the current case and his previous matters must factor into any viability assessment on moving for or achieving summary judgment. However, because each side shows its hand by bringing these motions, the period between the filing and the hearing (or the ruling if there is no argument) can present many opportunities to settle.

Following the steps above and undertaking a rigorous analysis of the case at the outset allow The Litigant to make realistic predictions about the viability of each side's potential summary judgment motions. In so doing, The Litigant can more accurately assess the risks inherent in proceeding to this late stage of the litigation.

For more information on the practical issues that The Litigant should consider when drafting a summary judgment motion in US federal district court, see:

- „ Practice Note, Drafting and Filing a Summary Judgment Motion, Opposition and Reply (<http://us.practicallaw.com/1-521-9045>).

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Post-trial and Appellate Stages

The case assessment also must address your risk of losing on the merits at trial and its exposure to damages and costs that include:

- „ Compensatory damages.
- „ Punitive damages.
- „ Statutory damages.
- „ Attorneys' fees.
- „ Offers of judgment.

Finally, the case assessment should account for the costs of posttrial motions and appeals, which can drag on for years. The client may be left in limbo, unable to move forward with company goals while stuck in litigation and with bond issues. In addition, the his or she may need to retain separate appellate The Litigant. Additional expenses associated with motion practice during the appeal itself may arise.

The post-trial and appellate stages should not be forgotten in an early case evaluation. Instead, The Litigant should carefully consider at the outset how to best present his or herself with a realistic assessment of the assorted options throughout a case's life cycle, including these final stages.

For a flowchart of the stages of litigation that The Litigant can use as a worksheet to help estimate the costs a his or herself may incur at each stage, see Case Assessment Decision Tree and Costs Worksheet (<http://us.practicallaw.com/8-525-7430>).