

# Litigation Risk Assessments

Well over 95% of civil litigation cases settle. Many settle after expensive discovery, all too often on the eve of trial; but many times the parties know or could have readily learned most of the key facts relevant to the dispute without incurring much of this expense. Litigants often can achieve better case resolutions earlier, and dramatically reduce litigation expenses, through disciplined case management and rigorous early case evaluation. Use of a structured approach for evaluating cases – litigation risk assessment – is the key to this process.

In brief, a litigation risk assessment is intended to provide management with an early, concise evaluation of the risks and costs associated with a particular piece of litigation – whether a plaintiff case or a defense case. The format of a litigation risk assessment can be customized to suit particular cases and clients but generally includes the following components:

- **Introduction and Recommendation** – A brief summary of the nature of the litigation and a clear recommendation on the strategy for resolution.
- **Summary of Facts** – A summary of the key facts.
- **Case Status** – A short description of the current status of the proceedings, anticipated motions and discovery, and settlement discussions or their absence. This section also can address issues such as the existence of an arbitration agreement and insurance coverage.
- **Legal Analysis** – An assessment of any significant legal issues, including the benefits and risks of obtaining a binding judicial precedent.
- **Strengths and Weaknesses** – A succinct outline of the strengths and weaknesses of your factual and legal position, including such factors as the substance and impact of the evidence, the availability and quality of witnesses, the sympathy or not of the adversary, the friendliness or hostility of the tribunal, and the competence and experience of opposing counsel.
- **Budget** – The anticipated legal budget.
- **Possible Results and Probabilities** – An assessment of damages, including possible results, probabilities and discounted values, and anticipated litigation expenses. This type of probability assessment is well-understood by business executives, who customarily base business decisions on similar analyses. The case value assessment includes percentage estimates based on various potential outcomes. Although percentages may imply more precision than is justified, they convey information more clearly than imprecise adjectives frequently used in describing litigation risk. For example, does "likely" mean 51% or 80%? Is a "strong defense" one that will prevail 60% of the time or 25% of the time? A business person is entitled to know as clearly as possible what his or her attorney has in mind. Where possible results fall on a customary probability curve, the damage

assessment assigns high, median and low results and probabilities of 75%, 50% and 25%, respectively, to these results.

- **Conclusion and Recommendation** – Conclusions and recommendations may run the gamut from early efforts to settle or mediate the dispute, through targeted discovery with an eye towards settlement, to full-bore litigation.

A litigation risk assessment ordinarily should be from five to fifteen pages in length. Even a relatively complicated dispute can normally be summarized in fewer than ten pages.

Most importantly, every effort should be made to prepare the initial litigation risk assessment early – generally no later than 30 days after notice of the claim or litigation has been received in defense cases and prior to commencement in plaintiff litigation. Although information will be incomplete at the time of an initial litigation risk assessment, even a defendant facing an unanticipated lawsuit can ordinarily identify many of the key facts relatively quickly by reviewing documents, interviewing employees, reviewing publicly available information or simply asking the other side. Early case assessment often provides a picture of a case that will not change dramatically by the end of expensive discovery and aggressive litigation. It has been said, with some justification, that the litigation process spends 90% of its time attempting to discover the last 10% of the facts of a dispute. This high cost may outweigh the value of the information obtained.

An initial litigation risk assessment becomes the business plan for the litigation. This assessment should be reviewed, and if necessary revised, as the litigation progresses and more facts become available. The current discounted value of the case provides a metric against which settlement opportunities and the costs of further litigation can be evaluated.

What is the value of this process? Clients with whom we have worked to implement disciplined case management and rigorous early case evaluation report:

- Significant reductions in the number of pending cases. Dockets may be reduced by half or more as cases are aggressively evaluated early in the process.
- Significant reductions in the overall expense of litigation, including both payouts and attorneys' fees and expenses. Again, reductions of 50% or more are not uncommon.
- Reduced discovery expenses. By placing the need for discovery in the full context of the case, litigants can better prioritize or even eliminate some of the most expensive discovery such as depositions.
- Improved ability of business units to make informed settle-or-litigate decisions.
- Improved ability to settle disputes creatively, such as through an exchange of goods or services.
- Increased ability to retain a business or professional relationship with the adversary since disputes are settled earlier, before positions get hardened and feelings rise.

- Improved ability to evaluate the performance of both inside and outside counsel.
- Increased ability to identify the causes of litigation and to take countermeasures to avoid similar claims.

Perkins Coie would be pleased to work with you to implement or improve your approach to litigation management by assisting you to prepare litigation risk assessments for pending or future claims brought by or against you.