

Bensen & Myers
on
Litigation Management

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*Dedicated by Eric to
Maya, Timothy, John & Alex*

*Dedicated by Rebecca to
my parents and Jason, Arden, Stella & Lily*

*The authors would like to thank Roger M. Milgrim, a good friend and terrific lawyer, for his help in
making this book possible.*

BACKGROUND

Flipping through its pages will reveal much about what this book can contribute to effective litigation management. Its concise descriptions and colorful illustrations bring to life an integrated methodology for managing litigations that, when used in whole or in part, can substantially improve quality while reducing litigation costs. It is unlike anything else available today. Yet, it is not really complete without the story behind it.

Some years ago, we were involved in a proceeding before the International Trade Commission (“ITC”) that would prove to be a defining moment for many of those involved. The ITC is a unique forum where domestic manufacturers can seek protection against imports that violate their intellectual property rights. Although in most respects they are like any other litigation, ITC proceedings are notoriously difficult to manage, in part, because they tend to be large and complex, but mostly because of their expedited schedules (a good rule of thumb is that if you have something to submit, you have 10 days to do it). It did not help that we started out the matter and worked for some time with a very thin staff. *Very thin.*

We realized from the onset that we would have to put a lot of thought into how things were going to get done if the matter as a whole was going to be manageable. Our watershed decision was to meet regularly, apart from the regular strategy meetings, to focus solely on operational matters. The question was always the same: What can we do to make sure that team members had everything they needed to get their jobs done effectively and efficiently?

The answer, as we came to realize, was almost always the same: to develop new methods to distill and distribute information. The greatest challenge in managing a litigation is funneling the incredible mass of information it produces in easily digestible portions to the right people at the right time so that lawyers can focus on the work of being lawyers. And that’s what we did. If we needed a team to review documents, we set up a system to ensure that team members had current, well organized information about the individuals identified on the documents, a glossary of the pertinent technical terms and an up-to-date factual development summary so that they could quickly make an informed decision about each document’s relevance. For privilege review, we orchestrated a method whereby reviewers could circulate any document containing any indicia of privilege to two reviewers specially trained in the applicable privilege rules to ensure the determinations about privilege were consistent and well grounded. When a memorandum of law or brief had to be prepared, we put in place elaborate controls to make sure it had the full benefit of the team’s collective knowledge without team members working on it at cross purposes. There was more, of course, but that’s the idea.

From every perspective, the proceeding was a great success. Looking back on it some time later, we decided it would be a good idea to collect the ideas we developed (we could not use the actual materials because of confidentiality and privilege concerns) into a single set of materials that we could use in connection with other litigations. The seed was planted. Over the ensuing years, we revised, improved and expanded the ideas in the course of litigating other complex matters. We even found ourselves going back to our own materials from time to time for guidance on management issues. We very much enjoyed the challenge of developing better techniques for managing litigation and seeing first hand the effect they had on reducing costs, developing attorneys and strengthening our positions vis-à-vis opposing counsel (who never appeared quite as well prepared).

Against that backdrop, we also saw that market-wide, corporations were becoming increasingly concerned about skyrocketing litigation costs and increasingly willing to try new techniques to reduce them, none of which worked to their satisfaction. After a time, the market appeared to realize that the only way to cut costs was for outside firms to increase their efficiency.

Reliable means for Inhouse Counsel to do that, however, remained elusive. The reason is largely institutional. It is typically the case that attorneys do not often repeat specific functions as they progress through their careers. For example, while an attorney’s first exposure to document production will typically be as a reviewer, the attorney’s next exposure might not come until years later when much of the responsibility for the day-to-day discovery processes can be delegated to someone else. Moreover, even where attorneys have had hands-on

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experience planning the details of a particular process, there is rarely time to reduce those details to writing. The result is that litigation is mostly managed by “reinventing the wheel” without the benefit of any significant institutional knowledge. The lack of any standardized methodology for efficient litigation management that outside counsel’s management can be measured against is a major obstacle to Inhouse Counsel’s reduction of litigation costs.

We wrote this book to remove that obstacle. It sets forth a highly efficient, comprehensive and scalable methodology for managing litigations with concise explanations and colorful illustrations to permit easy implementation by Outside Counsel, and built-in reporting features, to permit easy evaluation and verification by Inhouse Counsel. That is, it satisfies Inhouse Counsel’s long term objective: having the means to cut litigation costs without sacrificing quality or unnecessarily interfering with the judgment of Outside Counsel.

That being said, because the methodology is set forth in sufficient detail to allow for easy implementation, the book can potentially benefit many members of the legal community.

For:

Inhouse Counsel who Retain Outside Counsel

The Book Provides:

A concrete, insightful and verifiable basis to fully evaluate how efficiently outside counsel manages litigation on a day-to-day basis.

Outside Counsel and Inhouse Counsel that have Brought Litigation Work In House

A full explanation and illustration of the efficient litigation management techniques that comprise the methodology.

Outside Counsel Associates

A clear explanation and illustration of sound techniques for carrying out individual litigation tasks.

Law Students

A practice oriented guide to litigation management.

About the Authors

This Book is the result of a long running collaborative effort by the authors during years of work on far reaching, complex litigations to develop and improve litigation techniques that foster a professional environment, enhance attorney development and, most importantly, provide better results and *value* to clients.

Eric E. Bensen is a coauthor of *Milgrim on Trade Secrets* and *Milgrim on Licensing*, two leading intellectual property treatises, and advises clients on complex intellectual property and litigation management matters. He has taught patent, copyright, and intellectual property licensing classes as a Visiting Assistant Professor of Law at Hofstra University School of Law and was in practice for more than 12 years with Paul, Hastings, Janofsky & Walker LLP and Dewey Ballantine LLP. During that time, he led attorney teams in successful litigations of highly complex patent and trade secret cases before the International Trade Commission and a wide range of intellectual property cases in federal and state courts throughout the country. He also negotiated sophisticated copyright, patent and trademark licenses both here and abroad and advised clients on intellectual property licensing issues arising in large transactional matters. His clients have included technology, pharmaceutical, medical device, agricultural, entertainment and consumer product companies.

Rebecca Kelder Myers is an attorney at Paul, Hastings, Janofsky & Walker in New York. She concentrates her practice on intellectual property law and commercial litigation. Her practice includes litigating and counseling clients with respect to a wide range of intellectual property matters and assisting clients in establishing and maintaining rights in intellectual property through litigation, licensing and a variety of other contractual arrangements. In addition to litigation, Ms. Myers has broad transactional experience with a specific focus on structuring and negotiating complex transactions involving intellectual property issues. She represents a diverse group of clients including financial advisors, investment banks, and insurance, pharmaceutical, industrial and chemical companies.

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About the Consultant

Our expert consultant, Terri Thomas, is a Senior Counsel in the Legal Department of Navistar, Inc., a wholly owned subsidiary of Navistar International Corporation, a fifteen billion dollar corporation. Navistar, Inc. is one of the world's largest truck and engine manufacturers. Navistar, Inc. and its affiliates sell their products, parts and services through a network of dealer outlets throughout the world.

Terri supports the Dealer Operations Group in connection with both domestic and international dealers. In that role, Terri manages multi-million dollar disputes on behalf of Navistar and regularly retains outside law firms to assist with those disputes. Terri has managed litigation through trial and settled countless cases.

Prior to her work at Navistar, Terri worked in private practice for eight years. The first four of those years were spent with the Chicago office of Lord, Bissell and Brook, where Terri was a member of the London Litigation Group. In that role, she retained and supervised local defense counsel. Terri then spent four years at Kuser & Raucci, Chtd., a local governmental firm, where she worked on a wide variety of corporate and governmental matters.

Terri received a bachelor's degree from Augustana College in 1991 and a law degree from the University of Notre Dame in 1995.

INTRODUCTION AND OVERVIEW

We searched for some time for a better term than “litigation management” to describe the subject matter of this book. Its application here is accurate, but, widely used as it is, the term conjures up too broad a variety of subject matters, products and services to serve any utility in conveying the scope or purpose of any one of them. Unfortunately, the English language offers no better alternative.

It may help, as a threshold matter, to distinguish between “litigation management,” as we use the term, and the concept of “litigation billing guidelines.” Our methodologies for managing a litigation focus on “*how to*” litigate in an organized and efficient manner and *communicate* critical information with litigation team members and between Outside and Inhouse Counsel. Litigation billing guidelines, on the other hand, are more focused on what types of activities can be billed to the client and, using billing guidelines, how a company can better monitor spending and budgeting. We discuss the strengths and weaknesses of litigation guidelines in Appendix B.

It may also be helpful to distinguish between litigation management and document management. Simply, put, managing documents in the sense of setting up systems to ensure that people have ready access to the documents they need when they need them is just one aspect of litigation management as we use the term. Means for document *storage*, however, are outside the scope of this Book.

With those distinctions in mind, below we provide a “Road Map” of the book that should provide a helpful overview.

Chap I: Should the Case Go Forward?

Our book begins where it must, with the question of whether to go forward with the litigation. “Going forward,” of course, means bringing suit as the plaintiff and, as either plaintiff or defendant, foregoing settlement as the suit progresses.

The first step, of course, is to understand the respective strengths and weaknesses of the parties’ positions, which requires an evaluation of the pertinent facts and legal principles.

At this stage, the key to reducing costs and setting the stage to avoid duplicative work should the case go forward is for Outside Counsel to forgo the formal and ubiquitous memoranda and instead use a “building block” approach to fact and legal analyses that results in clear, concise, discrete statements of the law and the facts that can be easily updated. Using this approach, which we describe in detail, the pertinent law and facts can be readily made available to team members and Inhouse Counsel and easily revised to reflect factual and legal developments.

The relative strength of a party’s position is only one side of the coin, of course; the cost of pursuing the matter is the other. We provide a unique and sophisticated budget to answer that question. Using a short series of assumptions provided by Outside Counsel, our **Budget** runs over 750 calculations to provide cost estimates for the litigation on both a detailed and summary basis. The Budget not only serves that financial purpose, it serves a critical management role as well by providing a concrete basis for Inhouse and Outside Counsel to compare expectations about the scope of the litigation long before incurring costs.

Building on the fact and legal analyses and the budget, we also provide a methodology to determine whether it makes sense from a financial perspective to bring suit and, if the suit is already in progress, the amount at which it makes sense to settle.

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Chap. II: Is the Case Being Managed Efficiently?

This is the overarching question at every stage of the litigation. Here, we describe proper staffing for litigations and the appropriate level of attorney that should generally be assigned to specific projects.

We also address what is probably the most important question in litigation management: Are litigation team members getting sufficient information? We describe a methodology, built in part on the building block approach to the factual and legal analyses discussed above, that puts information concerning scheduling, assignments, fact development, legal research, definitions of key terms, identification of key people, document organization and contacts at each team member's fingertips in a manner that is easy to update and adapt as the litigation progresses. Moreover, it is easy to verify whether the methodology is being followed.

We also discuss how team meetings can be used to further the litigation in a cost effective manner.

Chap. III: Is the Discovery Process Being Managed Properly?

Other than trial, discovery is easily the most expensive part of the litigation process. Reining in and getting better control of discovery is a central part of any strategy to cut costs and get better results from litigation.

To that end, we separately address a number of elements of the discovery process.

Document Discovery

Key to the efficient management of the document discovery process is each member of the litigation team fully understanding exactly what has been requested by *both* parties without having to re-review the universe of document requests each time a question comes up. We provide a methodology for ensuring that such information is at each team member's fingertips.

When it comes to the actual collection of documents, it is of course necessary for Outside Counsel to spend time at a client's offices. While that presence is always somewhat distracting and disruptive for clients, the disruption to the client is unnecessarily compounded when outside attorneys are not properly prepared for collecting on site. That is especially true when the lack of preparation necessitates additional visits.

Being prepared for that job is much easier than one might suspect. We detail the steps that should be taken to prepare properly for document collection. Moreover, we provide the means of determining *before* the litigation team comes on site whether they are properly prepared for document collection.

A major component of the cost associated with discovery is the document review process, during which lawyers are too often put in the position of reviewing documents they do not understand and making determinations about relevance and privilege that they are not prepared to make. Properly educating reviewing attorneys and providing a system for efficient review of documents goes a long way towards reducing not just discovery costs, but overall litigation costs. We detail the preparations that should be made for document review and again, illustrate how to confirm that those preparations are made.

Much of the benefit of proper preparation in the document discovery stage will be lost if documents are not properly indexed for quick retrieval and properly tracked to quickly resolve discovery disputes. We detail how to do both with little additional effort.

Privilege Review

Privilege review, because it incorporates a distinct and important body of law, is a specialized species

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of document review and should be treated as such. Too often, reviewers with a rudimentary understanding of privilege issues are asked to make critical privilege determinations while struggling to keep pace with factual issues. The better process is to separate privilege review from document review for responsiveness. We explain how to do this and how to make sure that privilege reviewers are properly prepared for their unique task.

Depositions

Witness kits are critical to preparing for depositions, but are often prepared on an ad hoc basis. Whatever value the resulting transcript has is often lost among the mountains of such transcripts that are often produced. We detail and provide efficient means for pulling the right set of materials to prepare a witness for the substance of a deposition as well as preparing the witness for the deposition experience itself. We also provide the means to confirm that both processes are being done properly and describe how to maximize the value of depositions by ensuring that useful information contained in the deposition transcripts is readily accessible to team members.

Chap. IV: Is the Motion Preparation Process Managed Properly?

It is surprising how often good motions are lost because of the process used to draft them. If it is worth making a motion, it is worth managing the preparation process in a way that will ensure that the motion makes full use of the pertinent facts and legal principles and does not defeat its own purpose through mis-cites and internal inconsistencies. We cannot guarantee that the law or the facts will always be favorable, but we provide a method for preparing motions that ensures that the litigation team will make the fullest use of the pertinent facts and law. We also detail how Inhouse Counsel can play a constructive role in that process.

Chap. V: Are Attorneys Prepared for Trial?

In a sense, the trial chapter underscores the value of our methodology better than any other chapter. With the methodologies set forth in the earlier chapters, the litigation team will be largely prepared for trial before the trial preparation process begins. We detail what to look for in terms of preparedness at this stage, how existing materials can be leveraged for trial (again, to avoid reinventing the wheel), the additional work that should be focused on at this stage and how that work can be done in the most efficient manner.

* * *

As touched on in the preceding discussions, we provide not only a methodology for efficient litigation management, but also the means to verify whether that methodology is being followed at each stage. In the Appendix, we summarize that verification process and detail the various materials that should be prepared during the litigation process. We also illustrate how those materials can be used to not only better understand how the litigation is proceeding, but to evaluate how well it is being managed.

In the end, the methodology detailed in this Book should provide a wealth of guidance to litigation management and provide many relatively simple, verifiable means to cut litigation costs while getting better results.

While this Book is based on a simple, integrated methodology, we have intentionally presented that methodology in discrete, stand alone segments. Thus, *e.g.*, if the litigation on your mind now is about to go into the deposition phase, you can go right to the deposition chapter and begin using the methods we describe there to begin cutting costs. The next time a new litigation begins, you can apply the methodology from the very beginning to ensure cost savings, greater efficiency and verifiable progress on your litigation.

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EEB & RKM

HOW TO USE THIS BOOK

To get the most out of this book, it will be helpful to keep a few thoughts in mind.

Although it is comprehensive, we have used certain structural elements to make it as easy as possible to use. While there is some variation to account for subject matter, most chapters, and in some cases, subchapters, are divided into three sections:

I. Introduction (the Problems)

The introduction gives an overview of the stage of the litigation process covered in the chapter. Depending on the stage, the introduction may include a brief summary of applicable legal standards, although such standards, which are covered at length in other works, will typically not be discussed at length.

In every chapter, however, we discuss in detail the *management* challenges faced by Outside Counsel at the pertinent litigation stage.

II. Management Principles (the Solutions)

The second section identifies the solutions to the problems identified in the first section. Specifically, it identifies the key management principles that Outside Counsel should adhere to in grappling with the special circumstances of the phase of the litigation addressed in the Chapter.

III. Management Techniques (the Methodologies)

Having identified the problems and, in broad strokes at least, the solutions, the third part of each chapter moves into the heart of the book: the techniques that should be used to manage the pertinent phase of the litigation.

Taken collectively, the individual techniques of the various Chapters form a methodology for managing litigations that will achieve better results in a cost effective manner. The methodology is also verifiable in the sense that it is easy to determine whether it is being followed.

For the most part, a detailed discussion of the techniques is followed by a series of illustrations presented in a face-to-face format:

HOW TO USE THIS BOOK

Punnett v. Defendant COLLECTION PROCEDURE	
<p style="text-align: center;">Collection Procedure</p> <p>Function: The Collection Procedure is used to ensure a thorough and uniform collection with minimal disruption to your business.</p> <p>Key Considerations:</p> <ul style="list-style-type: none">• The Collection Procedure should be prepared in advance and a Core Team member should meet with the collecting attorneys to review the procedure before actual collection takes place.• The collection of documents on-site will probably be over-inclusive. This is intentional to streamline the process and reduce the disruption to your business and reduce any need for the attorneys to return to the site at a later point.• The Document Review process, which will be done at Outside Counsel's offices, will allow time for a closer inspection of documents.	<p>INTERVIEW:</p> <ol style="list-style-type: none">1. A team of two people, one from the firm, one from the client will meet with each employee identified by the client as possibly having relevant documents and conduct the interview (see Employee Interview Form). The Employee Interview Form will be completed, signed and dated by the lead interviewer. <p>COLLECTING HARD COPY DOCUMENTS</p> <ol style="list-style-type: none">2. At the end of the interview, the team will systematically review the office or other locations identified by the employee as having relevant documents. The employee may point out numerous locations of relevant documents. It is the team's responsibility to ensure that all responsive documents are collected while performing a search that is appropriate in view of the employee's connection to the case.3. As files and documents are pulled from a particular location, a Collection Sheet will be inserted to indicate that files have been reviewed and collected. It is not necessary to insert a sheet for each document or file pulled. One or two sheets per drawer should be sufficient. The team should indicate on the sheet the date that the documents were collected.4. If a file has only a few relevant documents, pull the entire file and flag the relevant documents. If the majority of the documents in a file are relevant, pull the entire file and do not flag anything.5. The team should fill out a Collection Log for each interviewee. The log includes the interviewee's custodian's name, date of review, interviewer's name, a brief description of the files collected (i.e. the file names) and a description of the location of the files. The information should be sufficient to identify the files and their original locations, but it need not go into great detail. If the team happens to notice any particularly important documents in a file, they should identify the document in the "comments" section of the form. <p>Files documents collected must be listed on the log in the order that the custodian kept them. This information will be used when the files are replaced and to verify that everything has been scanned.</p> <p>A line should be drawn on the log whenever a new box starts to indicate when a box begins and ends.</p>

The first (left hand) page is always a concise explanation of what the second page is, why it is important and how it should be used in the litigation.

The "second" page, which is often multiple pages, can be one of several different things:

Templates

Most "second" pages are templates that can be reproduced and used by Outside Counsel, *e.g.*, **Employee Interview Form**; **Defensive Discovery Document Tracking Log**. (Bold brackets in the templates designate case specific information that should be filled in by Outside Counsel.) Many of these templates are presented with sample information provided to better illustrate how they can be used, *e.g.*, **Factual Development Summary**; **Legal Research Summary**.

Sample Instructions

Some second pages are samples of instructional material that can be used by Outside Counsel in the course of a litigation to provide guidance to attorneys, *e.g.*, **Coding Instructions**; **Privilege Review Instructions**. Sample Instructions can largely be used as is, but should be tailored to the particular circumstances of the litigation.

Instructions

A few "second pages" are really instructions, *e.g.*, **Core Team Assignments**, **Preparing a Motion**. These are intended to be relied on as is.

Worksheets

In a few instances, the second page is intended for use by Inhouse Counsel, *e.g.*, **Settlement Worksheet**, or for use by Inhouse Counsel and Outside Counsel together, *e.g.*, **Budget Worksheet**, for planning purposes.

It will be helpful to keep in mind that while the first page is always written to communicate directly to you, the reader, the "second" page, depending on its purpose, may be written in a tone appropriate for another. For example, in the segment concerning **Privilege Review Instructions**, the first page explains the importance of Outside Counsel's providing reviewing attorneys with written instructions concerning privilege review, but the "second" page, *i.e.*, the sample instructions, is written for the reviewing attorneys.

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