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You Have Been Served... Now What? 81 Tips to Successfully Manage Litigation

Litigation and Dispute Resolution


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CHEAT SHEET

- ***No one cares more than you.*** As in-house counsel, you should be the most invested in the outcome of bet-the-company litigation. The weight of success or failure will be on you — not the law firm hired to support you.
- ***It's all in the messaging.*** Have a messaging strategy from the start and continue to adjust it throughout the trial. What story are you telling?
- ***Know when to quit.*** Consider pursuing an aggressive Motion for Summary Judgment strategy, and locating game-changing prior art (for patent litigation), experts, and witnesses.
- ***Manage the litigation team.*** Set parameters for the core litigation team that includes limiting excessive hours (and billing), approving new members, and the submission of timely invoices.

From the world of the blindingly obvious, litigation is out of control. The transfer of wealth from the corporate sector to the litigation industrial complex is beyond absurd. Some of our wayward brethren have taken to the naked pursuit of wealth without providing any positive contribution to society and without any concern for the damage inflicted on companies, communities, and families. Billion-dollar jury verdicts based on pseudoscience, and class actions with payments to attorneys far exceeding the compensation to the affected class are becoming normalized. Our legislatures are running algorithms based on focus group research to see which course of action most ensures the flow of campaign contributions and therefore re-election. Waiting for our legislatures to fix litigation abuses is a non-starter. More than ever, in-house counsel must be prepared to manage litigation that could become a company killer. Harsh words for a harsh reality.

While there is plenty of blame to go-around, the ones most responsible for out of control litigation and the creation of the parasitic litigation industrial complex are the same individuals best in a position to stop the insanity. The blame and solution lies with us, as in-house counsel. Yes, it is our fault. We need to get more involved and do a better job of managing litigation. One bad result in litigation brought by unscrupulous attorneys is a bad result for all, as one unscrupulous plaintiff victory will encourage more inventive copy-cat litigation and more abusive filings.

This is a call to action providing insights to show you how we can make a difference when managing abusive litigation driven solely by the pursuit of wealth. In-house counsel need to know how to shut down or minimize the abuses we are up against, and more importantly to take action. We all share in victories, and our companies and the communities and families that depend on the jobs they provide are all harmed by losses.

Many of the suggestions that follow are based on the author's more than 20 years of experience in managing litigation both in the United States and internationally. Other comments and suggestions are based on conversations with litigators from different backgrounds. No examples are to be taken as a literal description of any event. Much of what is proposed is out-of-the-box common sense that too often falls by the wayside in litigation.

This article imagines the reader to be a new general counsel who is facing bet-the-company litigation. A GC who is not satisfied with the status quo. "That is just the way it is," is not a sufficient answer at their company. Choosing litigators is not addressed in detail as doing so would consume the entire

discussion. It is assumed that the company has a law firm experienced with the particular type of litigation being encountered. The focus is on US litigation, as the biggest litigation threats to many of the world's largest companies, regardless of where they are based, are sadly in the United States.

Without further ado, here are the 81 things to consider in order to provide your litigation with the best opportunity for a successful outcome.

You have been served: The clock is ticking

1. The clock begins to tick as soon as you are served. You have a set number of days to reply. The most popular time for service is between Christmas and New Year's as unprincipled plaintiff attorneys will seek to cut into your time to respond or hope service will slip through the cracks.

2. Set expectations with your management team in terms of costs and possibilities for success up front and provide regular updates. You should be extremely careful about what you put in writing as "attorney-client" privileged. Documents do find their way into the hands of opponents, who would love to tell a jury, "their own attorney admits …"

3. If there is a possibility of losing at trial, make sure to establish a strong record at each stage. Also, educate your management team as to the appeals process and the possible need and cost of posting a bond to cover any adverse judgment while the matter is appealed.

4. At all stages, including from day one, explain to your management team that no trial is entirely predictable, and that this is particularly true with juries.

5. Keep in mind that by working with your litigators early to set themes and focus the defense, you will help control costs.

6. In most jurisdictions you are provided a single opportunity to ding (replace) your judge. The time frame may be a matter of hours or days. Ask your attorneys if this option is available and how much time you will have available. Then plan accordingly. Investigate whether your judge is favored by plaintiff lawyers or has a background that might not look favorably on your positions.

7. Remember, at all times, that no one will care more about the litigation and achieving a positive outcome than you. If everything goes south, it will be on your shoulders. Your job is to move the needle — not just sit back and take credit when things go right.

8. Send your litigation hold memo soon after you have been served. Your litigator can provide a draft or sample. ACC's website also has examples. Your internal business team needs to understand that they should not be discussing the merits of a claim unless one of the company's lawyers or outside counsel has instructed them to do so. A few emails on the merits of the litigation not involving an attorney can sink a company for decades to come. Also, make sure that documents are not being destroyed, including putting a hold on any automatic document destruction policies. Spoliation of evidence claims can also damage a company for decades.

9. Always consider motivations. Bet-the-company litigation is terrifying to a company, likely a thankless task for you, and — in the worst case — a company and career-ender. Your litigator, on the other hand, might see it as a huge win and source of long-term cash flows. Therefore, your litigators might not be as motivated as you are to attempt to end the litigation before it starts, or to take an aggressive approach to the litigation. Motivations differ. Most companies are in business to sell goods

and services. Law firms are in the business of selling legal services. Few legal services can produce more money than a big litigation with a long tail if you consider appeals and potential retrials. Litigation has been known to continue for over 10 years.

10. Look for indemnification (a third-party duty to pay for your defense and any losses) in your agreements. There might also be statutory requirements for another party to defend you. For example, in some jurisdictions, a manufacturer may be required to provide a defense to a distributor of its product. Indemnification clauses likely have notification deadlines. You do not want to be accused of making decisions that affected the indemnitors ability to provide a defense and a settlement. Also, assume upfront that the indemnitor will not be motivated to pick up your defense, and plan accordingly. You might need to begin your defense while fighting for indemnification. If the request for indemnification might get contentious with a valued business partner, you should coordinate with the relevant internal business group beforehand.

11. If you are receiving indemnification (which is easier said than done), remain involved and ready to contribute assistance as a favorable outcome likely also benefits your company.

12. Keep in mind that your insurer, your indemnitor, and any joint defense group in which you participate might all have different motivations.

> **One bad result in litigation brought by unscrupulous attorneys, is a bad result for all, as one unscrupulous plaintiff victory will encourage more inventive copy-cat litigation and more abusive filings.**

13. If you do get indemnification, keep in mind that your interests might be adverse to the indemnitor, as your indemnitor may have no interest in preserving your company's good reputation or the impact of the defense or settlement on your business relationships. If so, consider getting your own representation

14. Be aware of notice and reporting requirements under your insurance policies. Some policies require notice of pre-litigation demands, whereas others do not. Whatever the case, timely put your insurance company on notice of the dispute in the prescribed manner (some policies require written notice — also notice to a broker may be insufficient) to ensure your company's ability to pursue insurance coverage for the dispute. While you might not have a policy that covers damages, there might be a duty for your insurer to provide a defense. An established strong relationship with your insurance broker can pay dividends as they can help you find coverage. If you are worried about increasing rates from reporting the lawsuit, keep in mind that insurance companies also flag companies that don't report litigation. Therefore either course of action has implications.

15. If a business decision is made not to immediately notify the insurer of a claim, calendar the deadline to tender the claim to avoid missing the claims-reporting deadline in the policy.

16. Review any agreements that might be involved in the litigation early. See if there are arbitration clauses, jury waivers, forum selection, or other clauses that might impact your strategy.

17. Keep in mind that if you appear weak up front, then you may be encouraging the litigation. Also, you may not be the prime target. You might simply be the test case. If you don't get a victory early, you may find the big players being brought in and then your ability to exit is compromised.

18. In patent litigation, search for prior art from day one. Don’t take “no” for an answer. Prior art can end litigation before it gets going. The more money spent on litigation, the more likely the other side will continue the litigation — primarily by bringing in new defendants. Your attorneys may not recommend disclosing your prior art early because the plaintiff may change their claims based on the disclosure, but the reality is that the plaintiffs are going to change their claims if new defendants are brought in.

19. Focus on messaging from the start and continue messaging throughout. What story are you telling? Typical litigators are focused on motion practice and going to war. You know your company and have industry knowledge. Work with your litigators to set the narrative. Get ahead instead of allowing the plaintiffs to set the narrative and fighting from behind. At the end of the day, judges and jurors (or adjudicators, depending on the jurisdiction) care more about a good story than legal technicalities.

20. Consider starting trial presentation slides early so that you can use the slides to establish your narrative in settlement negotiations, to educate your litigators and management team, and to identify holes or weaknesses in your strategy. Also, this provides a head start if you need to create a slide deck for trial.

21. Locate and give your litigators early access to key witnesses to preserve testimony. Keep in mind that employee turnover does occur and that a current employee will be easier to locate and more cooperative than a former employee who might have left the company on bad terms. In addition, these early interviews will help you understand your strengths and weaknesses, which will help you better define your strategy.

22. Pseudo-science plus creative exposure experts can lead to billion-dollar verdicts. If you are faced with such scenarios, address the pseudo-science up front and educate your judge about more credible explanations. Do not sit back and let the opponents drive home their inventive theories.

23. Attack the status quo. If there are assumptions being made about your company or questions raised, verify the assumptions, particularly those assumptions that might be dispositive. Do not assign this task to your attorneys. Take responsibility and do this yourself.

Tips to avoid litigation or limit its impact

1. The most frequent source of litigation is related to employment law. Employment disputes frequently can lead to class actions. To minimize this risk, employment agreements, employment handbooks, and HR policies need to be reviewed and updated annually as new laws are implemented or new court decisions publicized. Engage a proactive employment law firm that will inform you of a change in law, or new litigation that may impact your company. Being notified of seminars or being included on a mailing list doesn’t qualify an employment law firm as pro-active. Keep in mind that the more complicated your process is for terminating employees, the more likely the process will not be followed to the letter and thereby lead to openings for litigation.
2. For software companies sharing proprietary source code, make sure a restrictive agreement covering terms of use is executed (e.g., use of the code on a stand-alone computer), and add a random secret message outside of the brackets in the source code (e.g., “My dog’s name is Latte”). This way if there is litigation and you have the opportunity to review the other side’s code, you can search for your secret message. I have seen this trick stop patent

litigation in its tracks when my client was able to show that the party bringing the lawsuit breached the source code agreement between the parties by copying the source code and using this code to get its patent into practice.

3. For hardware companies, consider keeping engineering notebooks to record invention dates. This might help defeat a patent claim or limit damages.
4. If you have patentable subject matter that you do not plan to protect but that might be patented by others and used against you, then consider publishing this subject matter to ward of future attempts to patent the same subject matter.
5. To set the earliest filing date, consider filing a provisional (placeholder) patent while you consider whether you would like to invest in a full patent.
6. Consider adding “no jury” language to your jurisdiction clauses. Some, like myself, believe juries add time to litigation and lessen predictability.
7. Have good termination language in your agreements. For example, either party can terminate with 30-days notice, instead of requiring a default to terminate. Too much time and money can be spent arguing what does and does not constitute a default. Often the best solution to a dispute is to be able to get out of the relationship quickly and cleanly.
8. When you have training or talks before groups at your company, remind your co-workers that “emails are forever,” and that emails are not a place to air grudges or embarrass co-workers. A few nasty emails can last decades. Emails are easy to locate in an electronic search, and can bring down a company. Also, educate your people on the basics of attorney-client privilege.
9. Make sure your people know never to investigate the merits of a claim unless they are doing so at an attorney’s instruction. Any examination of the merits of patent claims by engineers will almost certainly find infringement as engineers tend to be a literal group, and many patents that are the basis of litigation are overbroad and should not have been issued. You don’t want the results of internal analysis admitting infringement to end up in a courtroom.
10. When preparing to file patents, do not do any search for prior art unless your patent attorney instructs you to do so. You do not want to inadvertently put yourself on notice of infringement, and thereby potentially be subject to increased damages. Also, you want to avoid embarrassing emails resulting from any such investigation to end up in court.
11. To improve your ability to defend patent litigation, start a patent program to build a portfolio of patents for cross-licensing as a means to end the litigation.
12. Keep in mind that online contests are a fertile area for class action litigation, as such contests in the United States can be subject to the laws of all 50 states as well as Federal Law. This is why there are boutique law firms that only handle this area.
13. Develop a formal document retention to help defend the company against claims of spoliation of documents.

24. Always educate the judge about the industry in your motions and filings. Do not let the opponents ingrain a false narrative and then be forced to fight from behind. Keep in mind that you might be undoing false narratives that go back decades. In doing so, you are helping to end long-term litigation against your company.

25. At all times, have a Motion for Summary Judgment (MSJ) strategy. This should be part of your strategy to end the litigation early. Even if you do not file the MSJ, you should always be considering filing one. The most efficient way to change the law is to win an MSJ, have the other side appeal, and then win the appeal.

26. Trust but verify anything you learn from your internal interviews. It is better to learn any negative information earlier rather than later.

27. If your litigators are not listening to your instructions or are treating you in a patronizing manner, keep in mind that this behavior will only get worse the closer you get to trial. If you decide being ignored, or merely humored, is unacceptable, then you should consider looking for a new litigation team.

28. At all stages consider the business impact of your decisions. Discuss various courses of action and potential impacts with your management team.

29. As you prepare your strategy, consider creating a strategy team that meets weekly to discuss the path forward and close out open issues. As you get closer to trial, you might switch to daily meetings to make sure nothing is slipping through the cracks. Consider inviting business and technical people to these meetings as they may suggest avenues of attack that would be missed by non-experts in the field.

30. Look for a business solution to settle the litigation. Perhaps there is a solution that allows you to make a new profitable business relationship rather than engaging in litigation.

31. Keep in mind your litigators do not get rewards from their law firm for settling litigation before it starts. Stay vigilant when it comes to motivations. If the litigators prepare a comprehensive strategy, they might be reluctant to deviate from it if the opportunity arises.

32. Review and comment on all motions to ensure they convey the narrative you wish to convey. If the narrative can't be conveyed, then have your litigators fully explain why. Make sure that your litigators realize you are not simply a "courtesy copy" after documents are filed.

33. Many litigations require production of certain individuals for deposition to reply to background questions related to the litigation. When appointing your "Corporate Representative" or "Person Most Knowledgeable" (also referred to as "Person Most Qualified"), the company's designated teller of events, be careful to properly prepare and defend the individual for deposition. A poor deposition in these areas can cause damage for decades. Keep in mind that when choosing these individuals, you are not required to appoint the person who will be the most helpful in establishing the plaintiff's case. Consider preparing an outside witness (e.g., an accountant to testify regarding corporate structure) who can testify from records.

34. Don't trust that hearing, trial, or deposition transcripts are accurate. Make sure you read the transcripts, or at least search for key topics to make sure they are accurately recorded. This is especially true when a non-native speaker is providing a deposition or testimony.

> **Focus on messaging from the start and continue messaging throughout. What story are you telling? Typical litigators are focused on motion practice and going to war. You know your company and have industry knowledge. Work with your litigators to set the narrative.**

35. Treat your witnesses and experts like gold and make sure your litigators do also. It is easier to find an attorney than it is to replace a fact witness. Some witnesses are impossible to replace.

36. You are likely best positioned to find fact witnesses and technical and industry experts. Do not entirely rely on your litigators to do this.

37. Always be looking to improve your fact witnesses and technical and industry experts. These are the people who will help sell your story to your judge and the jury (or adjudicator).

38. Is the litigation being brought in an obscure jurisdiction preferred by the plaintiffs? For example, the most popular jurisdiction for patent litigation for a number of years was the Eastern District of Texas. Thousands of non-practicing entities whose only assets were the patents they were litigating were registered in the Eastern District of Texas solely for the purpose of bringing patent litigation. If this is the situation, your first step may be to challenge jurisdiction.

39. The enemy of my enemy is my friend: If the litigation is part of an abusive pattern, talk to other parties who have been sued, and other defendants. On more than one occasion I have seen 15-minute conversations of this kind lead to millions in savings.

40. Evaluate whether an adverse ruling or plaintiff friendly settlement would encourage a future stream of litigation. If so, you may need to overinvest in the first litigation to ward off future litigation.

41. Consider your settlement position from the beginning. Discuss with your management team the pros and cons of settlement. A “settle always” strategy may be a valid short-term solution, but generous settlements may lead to litigation that continues for decades. Therefore, consider the long-term impact of any settlement strategy.

42. Establish rules for composing the litigation team at the start. For example, identify the core team, limit the number of hours your attorneys can work on any legal matter for any client in a day or week (I have seen billings for 24+ hours for a day and 120+ hours for a week). No new members to the team without your approval. All new team members have to be interviewed and accepted by you; if a team member leaves then the law firm will pay to bring the new person up to date, no rate increases (in one litigation I inherited, an associate’s rate was increased by over 150 percent over a two-year period) for the pendency of the litigation; all invoices submitted within 60 days or deemed waived, and so forth. Get these commitments in writing and follow-up immediately when one of your rules is breached. After one of your rules is violated, call the engagement attorney and the first words you hear should be “I know why you are calling, let me explain …” You have one opportunity to control the litigation team. If you do not control the team early, then it will be more difficult to get control as the litigation moves to discovery and then to trial preparation — a time where the huge dollars are incurred.

43. Get regular budgets from your attorneys from the start of litigation. Have the budgets updated in regular intervals. If you are unable to get a budget up front, then you will be unlikely to get a budget down the road.

44. Consider employing an electronic (LEDES-based) e-billing system to manage legal invoices. This can make challenging invoices and obtaining budgets more efficient.

45. Manage the litigation team. Do not allow the litigation team to manage themselves (which they are only too happy to do). There is a reason that Big Law firms have their names on sides of buildings and some of the most opulent offices you will see. Law firms, and particularly Big Law firms, are experts at generating revenue. Law firms also are far more experienced in managing their clients than their clients are in managing their law firms.

46. If you are hiring someone to manage litigation, think about avoiding hiring former Big Law litigators. For the reasons above, ex-litigators managing litigators tend to be very forgiving of extended motion practice and overbilling. After all, they have been trained that this type of behavior is normal and expected. Consider hiring someone with broad legal background and good organizational skills. Someone who can manage processes and a team. Someone who expects results and holds the team (and themselves) accountable.

47. If you are brought into a company with litigation across the country you may consider engaging a firm as “National Coordinating Counsel” to manage local counsel and coordinate defense strategies and experts. You might also hire a full-time in-house counsel or consultant to manage the litigation. Again, you do not want the litigators to manage themselves.

Don’t fall into the trap of immediately going to war. Continually brainstorm early exits, new experts, and various motions that can end the litigation.

48. Internally, if there is a big time commitment involved in the litigation and you do not have bandwidth, consider bringing in a top-notch paralegal or temporary attorney to work exclusively on the litigation part-time. These individuals can often perform tasks typically handled by your litigators, such as document assembly, resulting in cost savings.

49. If your litigators are hiring vendors, make sure they are managing the vendors, providing you with budgets, and managing the vendor’s budgets.

50. Don’t fall into the trap of immediately going to war. Continually brainstorm early exits, new experts, and various motions that can end the litigation.

51. Make sure that you fully understand the risks of pursuing ground-breaking litigation. For example, will any victory end up in appeal? Is this the case you want an appeals court to hear? Would an adverse ruling by an appeals court effectively end your business?

52. If your case does go up on appeal, and there are industry issues associated, consider reaching out to similarly situated parties who may be willing to file amicus briefs, supporting your position.

53. Consider establishing and taking an active role in putting the defense group together and focusing on your strategy. Make sure any such group is subject to a joint defense agreement so that attorney-client privilege is maintained.

54. Big Law not always the answer. Yes, it might seem that you will be more protected if things go wrong. Also, it might mean you are going to have more explaining to do if outrageous bills start showing up. Sometimes the best solution is hiring an ex-Big Law partner who runs an efficient practice with her daughter out of a small office near the airport. Also, keep in mind that in smaller jurisdictions, local attorneys likely have better relationships with the judges and their staffs.

55. Set a good record from the start. Runaway juries are real. Judges can make unfavorable rulings. Consider adding an appellate attorney to the team early in the process to make sure you establish a good record. Losing at the trial court level might not be the worst thing if you win on appeal and change the law in an important area. Do not use your litigator’s firm for appellate counsel as an independent appellate counsel can help you evaluate your litigators.

56. If your strategy is shot down by a ruling by a trial court, consider pursuing an interlocutory appeal. An interlocutory appeal is an appeal that asks an appellate court to review an aspect of the case before the trial is concluded.

57. Prior to commencing any appeal, carefully consider any risks to the company if an adverse appellate ruling is published and becomes law of the land on an important issue. Keep in mind that if your case doesn't present the best fact pattern to test the company's position on appeal, an appeal might not be the best option, as the potential damage of an adverse ruling is too high.

58. Keep in mind that some plaintiff law firms incorporate trial losses as a business expense and training for new associates. Their model is that all they need is one large payday to finance all of the losses. While they may not take each litigation seriously, you need to always be pursuing a winning strategy.

59. Maintain and increase knowledge of the litigation inhouse. Keep a repository of all records, experts, depositions, etc. If you ever have to replace your litigators these records can prove important.

How to be a good client

1. Lead, follow, or get out of the way. I vote for lead, but there are times when your best role is to provide support. If you are being a roadblock then look at how you can offload duties.
2. Be as demanding of yourself as you are on your attorneys and those who report to you. Simply barking orders and disappearing is a recipe for failure.
3. If you are wrong, adjust your strategy, and if appropriate, apologize.
4. If you don't know something, educate yourself. Don't pretend to be an expert. Know who the experts are and ask questions.
5. Be prepared for meetings. Set agendas. Be responsive.
6. Educate your litigation firm regarding your company and your industry. Find and introduce experts and those who can provide additional background in the areas of potential defenses and avenues for attack.
7. Remember, if you can't hold yourself accountable, the whole system falls.

60. When attending hearings, look at relationships between your firm and the opponent firms. If your attorney celebrates seeing opposing counsel in court, and they exchange big kisses on the cheek in front of you and the judge, this might be a hint that you hired the wrong law firm.

61. Keep in mind that if you simply settle quickly, you will see more litigation and the settlement costs go up.

62. In litigation, typically there is a flurry of activity and a period of calm. During the period of calm it is a good time to decide if you have the right law firm to continue in the litigation, and if not, to replace your litigation team.

63. Take every deposition seriously, including deposition preparation. One misstatement by a fact witness may take years to correct, and potentially may be shared with adversaries in unrelated

litigation.

64. Require that deposition outlines be provided to you in advance with an opportunity to comment.

65. Attend deposition preparation and the depositions. Litigators can be very aggressive on each side of the table. You never want to lose an expert because of mistreatment by the attorneys (yours of theirs). You might also find that you can be productive on emails or other tasks during the more routine parts of the process. During deposition breaks you, can offer advice regarding the direction the deposition needs to take to be sure that you are getting feedback consistent with your strategy.

66. Review the bios of the attorneys assigned to your team. Do not hesitate to call out the law firm if they are billing someone who hasn't passed the bar as a third-year attorney.

67. Be careful about allowing first and second-year attorneys on the litigation team. They will be sold as cost savings, but in effect, you will be paying to train them. An experienced paralegal might be a better option.

68. Remember not every attorney on the team is a superstar doing incredible work and saving you money because of their incredible efficiency.

69. Are you fighting the right fight? If the other side is likely to win the fight, consider changing what you are fighting about.

70. Do the plaintiff attorneys have a pattern? For example, do they settle immediately before the litigation commences? If you are dealing with one-off litigation and the plaintiff always settles prior to litigation for a nominal amount, then why invest big dollars in the litigation?

71. Always ask, what is the likely best result and worst result of any action or inaction? Why invest a great deal of money if the worst result isn't very bad to your strategy?

72. If you are facing a large-scale discovery process, consider eDiscovery solutions that might save costs. Keep in mind that the big discovery by a team of attorneys is big dollars, even if the process is outsourced. Also ask what is the worst thing that can happen during discovery or best thing you can find. It may turn out neither is particularly important and therefore not worth a significant investment.

73. If your law firm is local, visit your law firm's office often enough that the receptionist greets you by name.

74. If this is your first exposure to litigation, you need to be aware that "alternative facts" are alive and well in courtrooms and often such are treated as jury questions in the United States. If you might be subject to "alternative facts," develop a plan to counteract such a scenario up front.

> **When attending hearings, look at relationships between your firm and the opponent firms. If your attorney celebrates seeing opposing counsel in court, and they exchange big kisses on the cheek in front of you and the judge, this might be a hint that you hired the wrong law firm.**

75. Mock trials are often suggested by trial attorneys. Consider simply having a trial run of opening arguments. If you are employing multiple law firms, this exercise will help you select which attorney

will best handle the opening.

76. Don’t let the trial devolve into a war of legal trivia. The judge and jury (or adjudicator) are more interested in a good story. At the end of each day, very few details will be recalled by the jurors. Jurors will remember the overall story.

77. The jury is out on jury consultants. Law firms tend to recommend them, but many believe that an experienced local counsel can offer better opinions regarding jurors and that bringing in outsiders who stare at the jury pool and take notes might leave a negative impression on your ultimate jurors.

78. In addition to attending the trial, book a room at the same hotel (ideally on the same floor) as the war room. Even if you drive home each night you need to have a work area and the trial team needs to know you are watching and involved.

79. During trial, schedule and run strategy meetings at the end of each day. Report back to your management each night. Invite your management to these meetings and to attend the trial.

80. From the start, insist on a trial team that looks like your probable jury. A table full of attorneys for multiple defendants who are all white and in their 60s is a bad look against a plaintiff table with two 20-something attorneys and a jury of mostly Latinos all under 30.

81. Continually question and learn from the experience, not just at the end of the trial. Have the goal to be better at managing litigation than you were the day before. Good trial management skills are obtained by focusing on continuous improvement.

My hope is that the time invested in reading this article is repaid by the acquisition of new ideas that will make a difference and lead to more favorable outcomes in the litigation you manage. Feel free to disagree, argue, and discuss these ideas with others. That is how new better ideas come about. We need to be sharing better ideas, and not be easily accepting of the status quo. A bad legal result such as a large settlement of a baseless or frivolous claim or a claim based on pseudo-science, will only serve to encourage and fund more baseless or parasitic litigation. In this way, a bad result for one company is a bad result for all. On the other hand, there is little more satisfying knowing that you have gone toe-to-toe with those who seek to abuse the legal system for personal profit and came out victorious, or better yet changed the legal system for the better by achieving a result with wide impact.

ACC EXTRAS ON… Managing litigation

ACC Docket

7 Steps for Coronavirus Litigation Preparedness (March 2020).

5 Checkpoints for Strategic Litigation Planning (Jan. 2020).

Career Path: Litigation Doesn’t Have to Be Bad News for Your Company — Or for You (May 2019).

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Frank Fletcher is the general counsel of JM Eagle, the world’s leading manufacturer of plastic pipe, with 22 manufacturing plants across the United States. Fletcher worked for a law firm for in Tokyo, Japan for more than five years, where his main focus was managing international litigation and disputes for Japanese clients. He also served as general counsel for more than five years for Nero AG, a German multi-media software company, where he fought abusive practices by patent trolls and licensors of patents for patent-essential standards. In addition, Fletcher managed disputes and litigation while serving as part-time general counsel for several companies through OutsideGC, a law firm focused on providing part-time and temporary general counsel services.