Behind the Curtain

What is the Engine that Makes AFAs Work?

By John F. Brown Jr. and Thomas M. Clark

Whether a client is retaining a firm in a routine matter on a flat fee basis, or on a risk collar or holdback-bonus alternative fee arrangement (AFA) in a complex case, both engagements require the law firm to absorb financial risk predicated on their skill in assessing how much attorney time will be required to achieve a successful client outcome.

Projecting a budget not to take a case to trial, but rather to take a matter to a likely optimal resolution point requires considering a number of factors. How long will the case last? Is it necessary to have a sitting jury to force a resolution or is there an earlier inflection point where an economically rational plaintiff's counsel will consider a resolution? If a voluntary resolution short of trial is the goal, how does one most effectively educate and persuade the adversary that a fact finder will most likely see it your way on the handful of outcome-determinative issues? What sequence of legal activities, discovery and motion practice will likely communicate and carry that burden of persuasion? How intensively is it necessary to develop those pressure point issues in discovery and what is the cost to do so?

Tackling the Problem

Tackling the above questions requires bringing a blend of experience, judgment and mindset in a much different way than the mere compilation of a trial budget, which is often the lodestar of the typical hourly rate engagement. In fact, it can be easily argued that approaching litigation management with a trial budget mindset can become a self-fulfilling fallacy. A keeping the cards close to the vest defense style coupled with a discovery approach that seeks to maximize options and flexibility for ultimately trying the case is going to broaden work scope and fail to engage with and communicate to an adversary any compelling rationale for exploring an early resolution.

Some 97 percent of litigated matters resolve short of trial. As an example, a case might present as defensible, but nevertheless as one with recognized exposure where a real plaintiff demand/expectation might be in the 60-75-80 percent category of proven damages, and achieving a resolution in the 25-45 percent area might well be attractive on the defense side. Clearly in such a matter Approach 2, as outlined in the diagram shown here, is preferable to Approach 1.

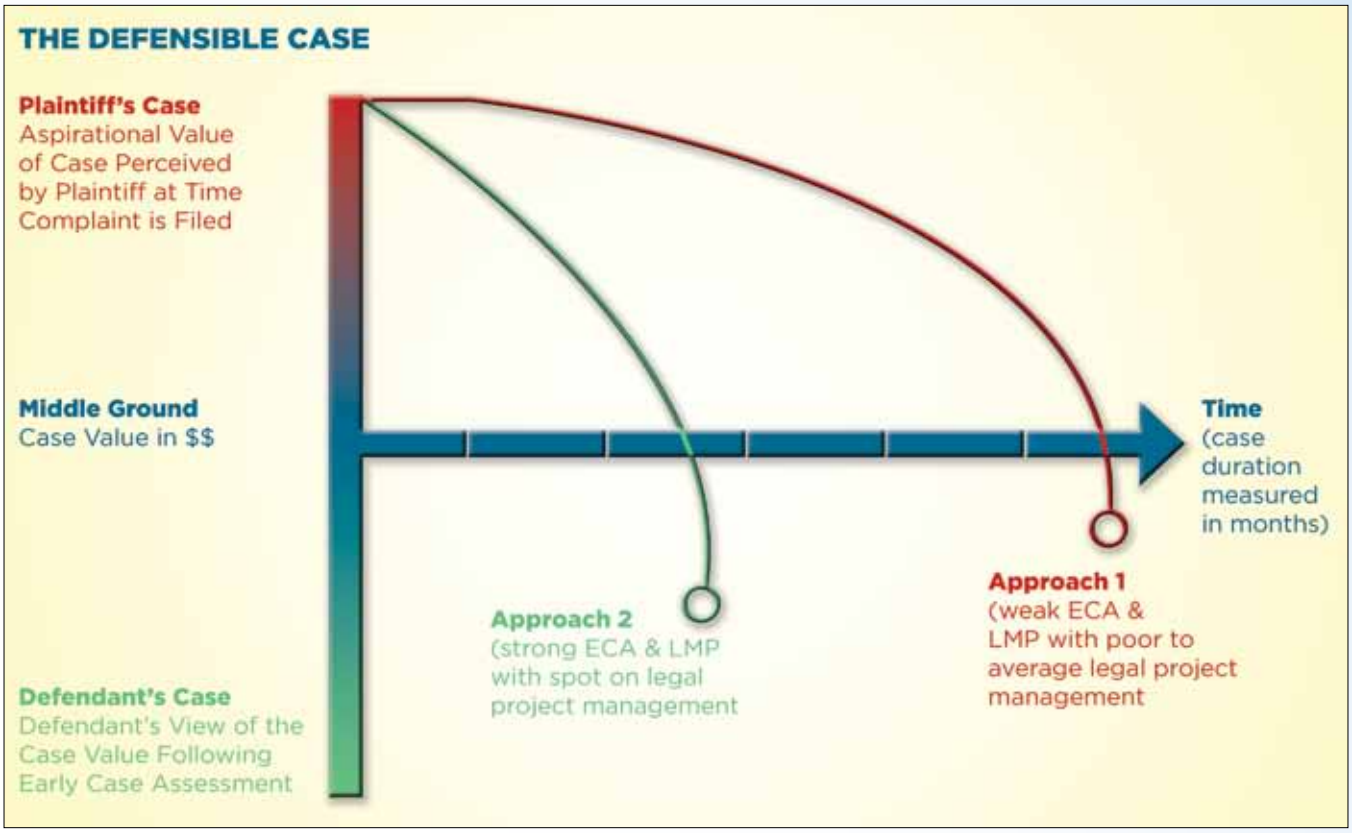
Less time to resolution should result in lower costs. The longer a case goes on, the more invested plaintiff's counsel becomes, the more likely it is that select important items of discovery become lost and diffused in pursuit of completing an exhaustive check list of discovery, and the less likely the odds are of deflating plaintiff's expectations.

Early Case Assessment

Early case assessment (ECA) is critical. How ambitious is the ECA process? There is a huge gap between issue spotting and creating linear to do lists that presume a trial destination compared to figuring out at the outset the best intersection of facts from documents and witnesses, forensic and expert theory, and statutory and case law that will best present the case to a fact finder. Along the same lines, assessing not just the potpourri of allegations in the plaintiff's complaint, but realistically how the plaintiff will most likely have to present their case at trial, can help identify what bricks defense counsel should attempt to pull out of the wall of the plaintiff's case to cause the collapse of that narrative.

The litigation management plan has to encompass smart choices on how to sequence the development of hot button issues in discovery and motion practice that will best provide opportunities for early favorable resolution. Proper judgment has to be exercised as to the depth those issues need to be developed to create a perception of sufficient vulnerability of the plaintiff's case so that your opponent will engage in resolution discussions.

As an example, in attempting to undermine a plaintiff's explanation for the happening of an accident merely using scene photographs coupled with basic 2-D sketch diagrams and an expert narrative report may be accurate and substantiated. That approach, however, may fall well short in persuasive power when compared to a computer-generated translucent cutaway images that



can zero in on and fully illustrate the genuine causation issue. Concentrating resources in a few areas can often generate more bang for the buck than exploring a wide range of potentially relevant issues in many areas with a relatively undifferentiated emphasis.

The challenge is to identify where in the case can money be most effectively spent to create the most verdict risk for your adversary and therefore create the biggest shift in their position.

Legal Project Management

Without effective legal project management, potential gains from even a well thought out ECA will fall short. All cases require that some defense avenues of pursuit be de-emphasized, if not abandoned, and that other areas receive a greater allocation of resources. The risk in a firm that relies on a leveraged hierarchical structure with heavy use of associates and junior level partners supporting insulated trial partners who only step into the case in the later stages is that those resource allocation calls don't get made in a timely way.

Part of legal project management is assigning the right people with the right skill level to the task at hand. Junior partners with minimal trial experience taking depositions is a formula for depositions that are more often than not in the, "tell me what you know and please explain this" mode than a sharp cross examination useful for impeachment at trial. Similarly, having associates review documents without a real understanding and experience of the deposition process can result in too many documents in the case mix as opposed to narrowing it down to that subset that can have an impact on the big picture.

The simple economic fact is that historically law firm profits have been based largely on leveraging associate and non-equity partner time, and to a considerable extent that has influenced staffing and management of cases. AFAs shift that economic reality to paying for results not time recording. Delivering those results requires a much different level of partner involvement, one that is ideally suited to delivering a higher quality of legal project management.

The Process Engine Behind AFAs

Assessing what resources are required to bring a case to a successful resolution, in essence the budgeting question that underpins negotiating and reaching an AFA agreement, requires the application of experience, judgment and an outside the box mindset that thinks beyond trial budgeting.

Charting a course through the litigation forest certainly has unpredictable elements — downed trees and rapids blocking the path, appearance of predators, sudden lightening storms and the like. An experienced wilderness guide, however, should still be able to provide a fairly reliable estimate of navigation time and cost. The AFA process puts a more structured onus on the attorney at the outset to follow a disciplined and rigorous ECA, litigation management plan and legal project management. LM

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