MAP a Complex Case

A Guide for Managing, Analyzing, and Presenting a High-Risk Case

Fourth Edition

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Preface

In the early 1990s, I was thrust into the position of COO (Chief Operating Officer, a.k.a. the director) on a high-risk, trade secrets case heading for trial in a federal district court. I had never served in such a role. The case met the definition of a high-risk, complex case: it involved myriad legal and factual issues, relatively complex technology and industry practices, a vast amount of documents, and a large cast of witnesses (including many expert witnesses). With a damages claim against our client for $100 million, it was definitely a high-risk, complex case. My new role as the director was to manage the deadlines, the team, and, ultimately, our courtroom presentation—while also taking on a significant role as trial counsel.

I had received no training in law school concerning how to manage a complex, high-risk case or a large team. The formal training I had received from my law firm, which provided great legal training, had focused on substantive topics, not soft stuff, like how to run a team meeting. I had a lot of experience running my own smaller cases, sometimes with another lawyer and a paralegal helping on a part-time basis. I also had a good number of jury trials on smaller cases under my belt. I was competent at managing myself and my cases and preparing my smaller cases for trial. But those past experiences didn't ready me for managing a much larger team of lawyers and directing the presentation of a high-risk, complex case.

The trial of the trade secrets case lasted for more than three weeks, and it involved about thirty witnesses. After I was appointed to the COO position, I felt like Robert Redford in the movie *The Candidate* (1972). After Redford's character—an upstart liberal who wins a U.S. Senate race—falls completely under the control of his campaign manager, he looks at the manager with fear in his eyes and asks: *What do we do now?* I could totally relate to Redford's character. In my new role as the COO, I continuously asked myself: *What do we do now?* I wished for an instructional guide to direct me on how to manage, analyze, and present a high-risk, complex case.

This book is that instructional guide—first published twenty-three years after that trade secrets case went to trial.

I wrote this book primarily for the litigator transitioning from a tasked or project-based role on high-risk civil cases to leading either a segment (a project) or the entire case (the program). Even today, despite the great emphasis on the importance of applying project management principles to legal services, there's still not much effective instruction in either law schools or law firms on how to make that transition. More important, there's little instruction on how to flourish

in the role as a project or program leader. The project management training provided by continuing legal education providers tends to focus primarily on managing cases under alternative fee agreements and controlling the legal spend. Those are important topics, but they don't comprise everything lawyers need to know about how to MAP a complex case.

I use the initialism **MAP** (along with the verb "MAPing") because litigators and trial lawyers responsible for prosecuting and defending a high-risk case, **M**anage, **A**nalyze, and ultimately **P**resent the proof points to a judge or jury. The goal in presenting the case is to tell a memorable, emotionally believable, and intellectually honest story presented in a way that is easy for others to visualize.

The book is divided into four parts. Part 1 (Chapters 1 through 6) covers managing the case. Part 2 (Chapters 7 through 12) covers analyzing the case record. Part 3 (Chapters 13 through 16) covers presentation principles. Part 4 (Chapters 17 and 18) offers two approaches for reviewing the case and team performance using a "Braintrust" review.

The book progresses in a logical instructional sequence, starting off with chapters on managing, then analyzing, then presenting, and, finally, reviewing. I wrote each chapter mindful of the previous chapters. But each chapter can also be read as a stand-alone piece—meaning if you need guidance on how to prepare an effective litigation budget, you can read Chapter 9: How to Create a Litigation Budget without having to read the entire book. I do, however, strongly encourage you to read every chapter and address the discussion questions at the end of each chapter.

While I occasionally use a patent infringement case to illustrate the teaching points, the principles discussed apply equally to *any* type of high-risk, complex case and any form of fee engagement, including the standard billable hour, contingent fee, blended rate, fixed fee, etc. The methods taught in this book will prove useful and applicable to any case prosecuted or defended by any litigation team, regardless of the size of the law firm employing the team members. In a nutshell, the principles taught in this book are generalizable. They can be applied to *any* type of high-risk civil case by *any* litigation team.

Before retiring as a litigator and trial attorney in December 2017, I was a partner at a large, multinational law firm—McDermott, Will & Emery in its Silicon Valley office. While I practiced law for over thirty years, I have always been a student and a teacher at heart. I like thinking, writing, and presenting on ways to improve performance—mine and a team's. This book sets forth the methodologies, processes, and protocols I developed over the last thirty-plus years from my experience—initially with personal injury cases, then with commercial cases, and finally, for the last fifteen years, with complex, high-risk intellectual

property cases. Many of my instructional points are based on extensive readings from other disciplines that I have adapted for use with complex cases.

After my first experience leading that litigation team in the trade secrets case, I set forth on what turned out to be a very long journey of instructing lawyers and later law students on how to manage, analyze, and present a high-risk case. Since my first awkward presentation given at a seminar sponsored by the University of Houston Law School in 1992, I've given a vast number of presentations to a wide array of diverse lawyer groups, including numerous bar associations across the country, the American Intellectual Property Law Association, The Sedona Conference, and the U.S. Department of Justice. I've also taught countless continuing legal education seminars.

In 2002, I created the course Managing Complex Intellectual Property Litigation, which I believe was the first law school class to focus exclusively on the management aspects of a complex case. I taught that class at Santa Clara University Law School for twelve years (2002–2014) and resumed teaching in August 2018. All of the points in this book have been refined through hours of teaching as an adjunct law professor.

I also practiced what I preached. I applied all of the methodologies, techniques, and approaches in this book to the cases I was tasked to direct for a wide variety of clients in a wide variety of cases, including cases for Bayer Corporation (mass tort litigation), Amgen (antitrust case), Seagate Technology (product liability and trade secret cases), and technology companies like Qualcomm and Hewlett-Packard (patent infringement cases), among many other tech companies.

Finally, this book is written principally for lawyers charged with the responsibility for MAPing a high-risk, complex case. I assume you are reading this book because you are trying to become a better CEO/director, COO/assistant director, or project lead and want guidance on the challenging endeavor of leading a litigation team and presenting a complex case. But this book will also prove valuable to any person connected with the MAPing endeavor, including other lawyers on the team, the paralegals and staff who provide the administrative support, and the client.

All the best!

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Thanks to my good buddy, Larry Collins, founder and CEO of CaseSight, Inc.—the best litigation/trial graphics firm in the country. Through his consulting work at CaseSight, Larry has observed and worked with the best-of-the-best trial lawyers. I tried to capture the many insights Larry gave me through the countless hours of conversations we've had about what does and does not resonate in the presentation of a complex case. Those insights, too many to mention, are shared in the presentation section of this book. And thanks to Brian Insieme at CaseSight for his brilliant artistry shown in the logo used on the cover design and all of the graphics that appear in this book.

Finally, thanks to my editor (and friend) Janis Bell. Janis is the author of *Clean, Well-Lighted Sentences*. (Buy her book!) I was so blessed to have Janis as my editor on this fourth edition. Her master-grammarian eyes and rigorous copy edits vastly improved my writing.

Introduction

A Dysfunctional Team

To understand how a functional litigation team performs, we need to consider how a *dysfunctional* team performs. Many of the MAPing methods taught in this book are implicit in the dysfunctional team's performance because what this team lacks are precisely the practices I recommend. I assure you: if you apply my MAPing methods, your team won't suffer from the dysfunctions I am about to describe.

Here is the situation: the litigation team is defending a complex, high-risk patent infringement case. There are four patents asserted by the plaintiff. This plaintiff is a competitor of the defendant. The plaintiff seeks significant money damages and a permanent injunction, which, if granted, would pose a significant threat to the client's business.

The defending team has four project teams: a noninfringement team (tasked with proving that the defendant's products don't infringe the asserted patents), an invalidity team (tasked with proving that the patents are invalid and/or unenforceable), a damages team, and an administrative team (paralegals and support staff). The noninfringement, invalidity, and damages teams are each run by a partner, with assigned associate attorneys. The lead lawyer, another partner, serves as lead trial counsel. If the case goes to trial (and it will), he'll conduct the jury selection, give the opening statement and closing argument, and examine key witnesses.

There's no lawyer functioning in the COO (chief operating officer/director) role. The senior paralegal functions as a sort of de facto COO, but he has little clout with either the partners or the client. The partners running the noninfringement, invalidity, and damages teams don't collaborate. Those teams litigate their respective issues as independent silos. The collective team lacks a clear and coherent direction. There's no defined mission. There's no story development. Team members toss around ideas on the trial theory and themes, but nothing crystallizes. Nor do the key members of the team come together to discuss the key issues, the key documents, or the key witnesses.

The lead lawyer is engaged on several cases. He comes in and out of this case when his schedule permits. The team members must scramble to ready him for court appearances, the few depositions he'll take, and client meetings. When partners need a decision about an important matter, they go directly to this lead lawyer without first consulting each other. His typical response is "Let me think about it." The lead lawyer reserves all important strategic decisions for

himself, usually making them at the last minute with little input from other team members, who then must scramble to implement his sudden decisions. Once his decisions are made, the lead lawyer doesn't share the analysis or reasoning that led to them.

More specifically, here is what happened. The production of documents was a nightmare. There wasn't an initial planning session with the client concerning ESI (electronically stored information). The document collection was managed by the senior paralegal without close supervision by the more senior lawyers. Neither the senior paralegal nor the associates involved in document collection had influence over the client. The client resisted locating and producing all of the necessary ESI and certain key technical documents. The resistance went unchallenged. The associates involved informed the partners of the client's resistance, but none of the partners took action to convince the client to change its position—each partner thought someone else was handling the issue.

The problems with the document collection and production came to light during depositions of the client's technical witnesses, who identified important engineering documents the client never produced. The omission resulted in having to bring back those witnesses for additional deposition questioning, angering both the witnesses and the client. The opponent threatened to file a discovery-sanction motion. Fortunately, this never occurred.

The team had not conducted a comprehensive strategic assessment of the case before launching into fact discovery. And they had not created a plan before starting fact discovery. Because of the lack of an early strategic assessment and discovery plan, the team took a shotgun approach to discovery rather than a focused approach. Depositions of the opponent's witnesses commenced with no meaningful planning or defined goals. This approach to discovery mirrored the lead lawyer's approach to working up a complex case: he believed the key evidence needed for trial would be somewhere in the heap of discovery taken by the team—so the more discovery, the better.

There were no protocols for key work product (e.g., witness interviews, deposition summaries, research memos, trial modules). The team's key work product was created by team members and sent directly to the client by the lawyer who had generated it, with no quality control by the senior lawyers, and without first determining whether what was sent to the client was necessary or duplicative. There was also no agreed-upon format for any work product. The client received memos with entirely different formats, structures, fonts, etc., making the memos appear as if they had been prepared by different law firms.

None of the key work product that the team generated was placed into a common electronic location, like an e-war room or web room. The senior paralegal posted case information to folders on the firm's network, which now

contained about fifty separate folders. The senior paralegal was the only team member who knew where important information could be quickly located in those folders. Without specific knowledge of the content inside the folders, other team members found the folders extremely difficult to navigate. Out of frustration, most team members kept on their personal computers any important files they might need to access.

The partners working on the case asked the senior paralegal for information rather than accessing the network folders themselves. Fulfilling these requests took the senior paralegal considerable time and kept him from completing other more important work. He was putting in more hours than any other team member. He became burned out and considered resigning and taking a position with fewer hours and less stress. The team would be severely handicapped if he left the firm because he had acquired important legacy knowledge about the case, and this knowledge would be lost if he left. (Since the commencement of the case, the team lost several team members, with new members joining to fill the vacated positions. The client received e-mails from new members without knowing who they were or what aspect of the case they were responsible for.)

There were no protocols concerning e-mail. The e-mails generated each day overwhelmed the team members. Out of an abundance of caution, the associates working on the case copied the entire team list (i.e., an e-mail list containing some twenty names, including secretaries of the lawyers on the team, and other lawyers only tangentially involved in the case). Secretaries who generated and sent out letters or discovery typically copied everyone on the list. On average, team members were receiving about forty and sometimes as many as sixty e-mails a day. Several additional lawyers were copied on these e-mails, but it wasn't clear why they were getting them.

There were no regular team meetings. Meetings occurred only when the lead lawyer requested one because he had an important client meeting or court appearance coming up and needed to get prepared. The few meetings that occurred did not go smoothly and became the brunt of jokes among the associates and paralegals. The noninfringement and invalidity team leads were concerned only about matters pertaining to their respective issues. The lawyer handling the damages defense rarely attended the meetings. When the topic turned to another team's issue, attorneys not on that team tuned out and checked their e-mails.

One recent team meeting lasted two-and-a-half hours with the entire team present, including all of the associates and paralegals. The meeting got heated because the noninfringement team believed it had a strong position and wanted to make noninfringement the lead argument in the case; but this required a narrow claim construction, which upset the invalidity team, which wanted a broader claim construction to aid in invalidating the patents. The two project leads went

off on a lengthy technical discussion that lasted over an hour while the remaining team members and staff remained quiet. The associate and paralegal team members said nothing for the balance of the meeting, fearful of becoming the focus of a partner's wrath.

This meeting was typical of how most team meetings were run. The lead lawyer had called the meeting because an important court filing was looming and he wanted the team to finalize the main arguments for the brief. The team also had to get the brief to the client to review before it was filed. The lead lawyer exited the meeting shortly after it started, stating he had to get on an important call regarding another matter. Nothing got resolved at the meeting.

Ultimately, the final decisions concerning the key arguments for the brief were made the day before it was due to be filed in court. Several members of the team pulled an all-nighter to complete the submission. The court filing was riddled with typos, requiring the re-filing of a corrected brief. The client was upset about not being given adequate time to review the filing.

The way this court submission occurred was standard operating procedure for the team. Despite the client's expressing concerns and the problem with this filing, no one on the team questioned how projects had been completed or why mistakes had occurred. Moreover, there was no After Action Review to address how the same mistakes could be avoided in the future.

At the outset of the case, the client had requested a litigation budget, which was prepared by the lead lawyer (without input from the team leads). The budget projected attorneys' fees and costs of $5.25 million through trial. The trial was about six months away, but expert depositions hadn't started, and the pretrial matters (e.g., summary-judgment motions and the pretrial preparation) were expected to be time-consuming and expensive. Since providing the budget when the case had begun over eighteen months ago, the lead lawyer hadn't revisited the projected numbers and only recently learned that the team had burned through about $5 million.

The lead lawyer had to tell the client that the team would exceed the earlier estimate for fees and costs. The original estimate presented to the client had been based on certain key assumptions made by the partners. One of those key assumptions was that the opponent would cooperate with the team's discovery requests, which proved to be wrong. Virtually every aspect of discovery had been contentious, requiring motions to compel by both parties and driving up the legal fees. The lead lawyer, however, had never shared with the client any key assumptions relied on to generate the original budget.

The client considered the original fees-and-costs projections as a *budget*, not an *estimate* that could be exceeded. The client stated, "A deal's a deal," insisting that the fees and costs be capped at the original amount. The client

expected the team to complete the case with the amount remaining in the budget, about $250,000. The trial would last two weeks and the lead lawyer estimated that the remaining fees and costs would be at least another $1 million—meaning a shortfall of at least $750,000.

Finally, team members—especially associates and staff—began to privately voice their negative feelings. They dreaded team meetings, felt ill informed, and hesitated to speak up for fear of backlash. They wished they were working on another case team that wasn't so disorganized and unfocused.

Part 1

Managing

Chapter 1

How to Apply Project and Program Management Principles

> A program is a group of related projects managed in a coordinated way to obtain the benefits and control not available from managing them individually.
>
> —*A Guide to the Project Management Body of Knowledge* (2004)

Overview

High-risk, complex cases are challenging to manage, analyze, and present. *Why?* Because they are technically and factually complex, not particularly interesting to most jurors (and some judges), and presented under tight time limits. As a trial lawyer, I understood the importance of having a strong and compelling theme, theory, and story—especially if the resolution venue (i.e., the venue where the case is resolved) is a jury trial.[1] But it's the rare high-risk, complex case that goes to trial. Because of the risk and the cost to go to trial, almost all high-risk, complex cases settle or get dismissed through motion practice. And because the timely and efficient resolution of the high-risk case is usually the client's desired end-goal, what matters most to the client is how the litigation team executed. Clients ask: *Did the team accomplish the Mission on time within the agreed-upon fee arrangement?* The answer depends on how well the team applied principles of project and program management and executed on the case planning and strategy.

Project management is the discipline of managing a project. In the guide published by the Project Management Institute, a "project" is defined as a "temporary endeavor undertaken to produce a product, service, or result."[2] The guide defines a "program" as a "group of related projects managed in a coordinated way to obtain the benefits and control not available from managing them

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[1] The resolution venue is not necessarily a trial. It's *any* venue where the complex case is resolved, including by way of motion practice or mediation, which is how most high-risk, complex cases are resolved.

[2] Project Management Institute, *A Guide to the Project Management Body of Knowledge (PMBOK® Guide),* 3rd ed., Newtown Square, Pennsylvania: Project Management Institute, Inc. (2004), 5.

individually."[3] Understanding these two definitions (project v. program) is central to the key takeaway point of this chapter.

This chapter discusses why effective project management for high-risk, complex cases (and legal projects generally) has taken on great importance in the legal industry; the key project management steps; how the organizational structure used influences team operations and performance; and my ten directions for running the high-risk, complex case *as a program.* The key takeaway point for this chapter is: **Running the complex case as a program, rather than as a project, will profoundly change how the case is managed.** Doing so also avoids many of the problems encountered using a traditional hierarchical-project structure.

Finally, I caution the reader: The knowledge and information that make up the discipline of project management is an ocean of information. We will wade into a small tide pool of that ocean to grasp and apply basic principles of project management to improve your team's performance.

Project Management Today in the Legal Industry

The legal services industry experienced (some would say suffered through) a huge sea change after the financial meltdown in 2008–2009. The perception—actually, the reality—is there are too many lawyers in the United States and not enough work to keep them all busy. The downturn created a buyer's market, presenting an opportunity for consumers of legal services (i.e., clients) to address the long-fermenting dislike of the unchecked billable-hour engagement. Clients began to insist that law firms focus on controlling costs by applying project management principles to legal projects.

There is one thing we should all agree on: the legal service industry experienced a fundamental change. In the parlance of Silicon Valley (where I live and practiced), we're operating in a new paradigm.

Many companies insisted—many for the first time—their outside firms handle legal matters by employing project management methods to provide greater "value." Many companies now assign work to firms only under an alternative fee engagement (AFE). (The traditional billable hour is not dead yet, but it's dying a slow death). Under an AFE, the law firm must properly manage the legal project to ensure a profitable engagement. If the matter is poorly managed by the firm, with fees and costs exceeding the agreed-upon AFE terms, too bad for the law firm. "A deal's a deal."

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[3] *Id.,* 18.

Project management became (and remains and will continue to remain) an important subject in the legal services industry. Numerous consulting firms tout their expertise on the subject and—for a fee—will stage training for lawyers. Continuing legal education providers jumped on the bandwagon, offering countless seminars on project management. (I have taught many such seminars.) Many law firms advertise the project management training their lawyers must complete as part of the firm's internal training.

One firm required their lawyers to receive training on Six Sigma management techniques. The firm received a lot of favorable press for doing so. Six Sigma is a complicated manufacturing process built around tools and techniques designed to improve quality and reduce costs. While the firm's training was laudable, Six Sigma was invented at Motorola in the 1980s. That the firm received kudos for applying a business management strategy *from the 1980s* shows just how far behind the legal services industry is in applying proven business methods to improve the quality of legal services and lower costs.

What is striking about the extensive training offerings on project management is that most of the training focuses on budgeting and controlling the legal spend (i.e., the total fees and costs for a legal project or the entire engagement). Don't get me wrong, budgeting and controlling costs are critical to nearly all legal engagements. But as a student and teacher of project management methods, I don't feel that project management receives the respect it deserves. There is so much more to project management as applied to a complex project, like a high-risk, complex case, than merely focusing on how to lower and control the legal spend.

Effective project and program management is a principal contributor to achieving the mission. The theme, theory, and story finally presented at trial are huge contributors to achieving success and accomplishing the mission. But these things won't mean much if the litigation team is poorly managed, the case is off track and way over budget, and the team has not obtained and developed the facts to present a compelling, persuasive, and highly believable (and visual) story. (Jurors also have strong noses for sniffing out and seizing upon unkept promises made in opening statements about "what the evidence will show," and for opinions from experts that are not supported by the underlying facts presented.) Effective case theme, theory, and story emanate from a properly developed and managed program and the projects comprising the program.

When my wife and I visited Israel, our tour guide pointed to the water in the Dead Sea and told us: "If you drink it, you will die!" The opposite can be said for a complex case. If you don't apply effective project and program management fundamentals, you will die! Given the pressure lawyers are under to achieve the mission under the constraints imposed by the courts and the clients,

litigating a complex case without applying effective project and program management risks death.

If you're running your team under the old and broken model, it's time for a change. The old days of handling a complex case the same way the Egyptian pyramids were built—with one leader calling all of the shots and adding more and more associates to the team to meet deadlines—are long gone. Law firms can no longer staff matters without regard to how much time is spent or how the client's legal project is managed and completed. Clients demand and deserve careful planning, competent and effective execution by the litigation team, control and containment of the legal spend, and success in achieving the mission.

The Management Challenges Presented By the Complex Case

Managing a large program, like a high-risk, complex case, poses unique interpersonal challenges and logistical challenges. Often the team assembled may not know each other well or may have never worked together as a team. There's no work history shared by team members, nor shared knowledge of team members' strengths and weaknesses. But these challenges exist with most project teams. Compared to other kinds of projects, however, there are four distinct management challenges for the complex case:

1. The law firm's hierarchy.

Within the law firm hierarchy, some team members—like the lead trial lawyer—may be above the program lead (the director) or project leads. I served as the director (a role discussed in Chapter 3: How to Flourish as the Director) on high-risk, complex cases where the lead lawyer was higher up on the law firm hierarchy (i.e., older, more trials, more clout in the firm, and, more important, paid more than me). Yet I still needed to manage and direct the team and that lead lawyer without regard to his or her seniority or clout in the firm. Everyone on the team has a job to do. The jobs must get done properly without regard to the firm's hierarchy or anything else that may compromise the mission.

2. An opponent.

Every complex case—unlike most other programs/projects except political campaigns—has an opponent. Your opponent's job is to make sure your team fails to achieve the mission. You must plan both your team's and your opponent's strategy. You must also anticipate your opponent's next tactical move and be ready to react immediately.

3. Little or no project management training.

Lawyers receive little or no training on project management. Even if training is provided, often the person appointed to manage and lead the litigation team (the director) is poorly suited for the job, having been selected because of lawyer skills or technical prowess, rather than his or her ability to lead and manage a team. Managing a complex case is just like managing any other team or group effort: It requires that amorphous thing called "people skills," and there is even less training of lawyers in that area.

4. Nonexclusive assignments.

From a control perspective, the director must often manage a team whose members can't devote 100 percent to the case because of other case commitments or cost constraints. Associates and staff working on the case are often pulled away to work on other projects. Even if team members can offer only 20 percent of their time to the case, they must be 100 percent committed.

The Project Management Steps

Project management is accomplished through the application and integration of six phases or steps: (1) initiate, (2) plan, (3) execute, (4) monitor, (5) control, and (6) close.[4] I combine steps (3) through (5) because they are usually performed close together. (In a 1990s Dilbert cartoon, the six phases of project management were described: (1) enthusiasm, (2) disillusionment, (3) panic, (4) search for the guilty, (5) punishment, (6) praise and honors to the nonparticipants.)

The initiate step begins with the decision to launch or defend the program—i.e., the high-risk, complex case. As part of this step, the team leaders and the client should also discuss and agree on the mission and the core constraints. Once the program is initiated, the litigation team must begin the planning process. Mission success requires clear and effective planning. At a minimum, the team will need to create and then execute on the following:

- Communication and work-product protocols (Chapter 4)
- Discovery plan (Chapter 8)
- Litigation budget or fees/cost estimate (Chapter 9)
- Trial modules (Chapter 12)

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[4] *PMBOK® Guide, supra,* 8.

The next three steps (execute, monitor, and control) are interrelated and performed close together, with one step immediately following another or done in parallel. The director has ultimate responsibility for ensuring that the strategy outlined in the planning documents is executed and must then monitor and control the execution. This is often difficult and often the cause of failure of many complex cases.

A team member may be designated the director, but authority is retained and controlled by another lawyer—for instance, the lead lawyer—who doesn't surrender control. Or the director is given the authority but fails to use it. Instead, that authorized lawyer defaults back to what is most comfortable to him: doing day-to-day litigator work and not managing the program. Either way, it's bad because there's no one monitoring and controlling the team's tactical efforts. Things go awry. The mission is compromised.

The work involved in properly directing a litigation team (and, trust me, it truly is work) and ensuring the planned strategy is executed, team assignments are completed on time, and the agreed-upon protocols are followed is often tedious and underappreciated work to *un*sophisticated clients. But sophisticated clients know the value that good case management provides. Sophisticated clients insist that a skilled lawyer serve in the role of director, deploy effective project management techniques, and actively lead the team. Absent strong political backing from the lead lawyer and the client, when push comes to shove, a tentative director will default back to his or her comfort zone—lawyering.

Closing a project or program involves winding down the team's operations and usually conducting a post-action review. The military engage in post-action review for every important mission or operation. The military call it "After Action Review." Using After Action Review improves team performance and avoids making the same mistakes over and over *and over*—one of the main reasons clients perceive that value wasn't delivered.

Core Constraints

From a project management perspective, the high-risk, complex case is akin to other large-scale projects/programs outside the litigation context—like producing a motion picture, constructing a building, or creating and bringing a new software release or a technology product to market. Like these other kinds of projects, a complex case has a relatively fixed team, a fixed schedule, probably a fixed budget, and a target goal or desired end-state (i.e., the mission). And like most projects, there are core constraints: time, scope, and costs.

- **Time:** When must the program be completed? A high-risk, complex case has a nonnegotiable and set time schedule. The time deadlines are set by the court's case management scheduling order.
- **Performance or Scope:** What are the specific performance or service requirements of the program to achieve the mission? At the micro level, scope means what work must be performed, who will do the work, and how much time should be spent completing the work.
- **Costs/Legal Spend:** How much does the client want to spend to complete the program to achieve the mission?

The core constraints are tightly interrelated. They can change quickly. If the trial date (time) is postponed, the scope and costs usually change. As Parkinson's Law states: "Work expands so as to fill the time available for its completion."

In the book *Winning Alternatives to the Billable Hour,*[5] the authors discuss how clients perceive value, noting often a disconnect between the lawyer's and the client's perception of value. The lawyer may perceive that winning a motion to dismiss certain claims provides value, while the client instead focuses on and measures the cost against the result achieved. The lawyer and the client may not share the same perception of value. But the client's perception of value is the reality.[6]

The client and the team must agree and remain in constant alignment on the core constraints. Misalignment breeds relationship problems. Any development changing the core constraints must be immediately addressed with the client. When a misalignment occurs, that's when clients usually perceive the team failed to deliver value.

The core constraints should be determined by the team leaders and the client, ideally working together to determine the opportunity or risk presented, the time necessary to achieve the desired result, and the money (or legal spend) the client (or the team) wants to commit. There will always be ways to spend more money on a high-risk, complex case—just as there are always ways to improve or add new features or design improvements to any product in development. There should be a proportional and reasonable relationship among these three factors: time, scope, and cost. The entire team must know the constraints

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[5] James A. Calloway and Mark A. Robertson. *Winning Alternatives to the Billable Hour,* 2nd ed., American Bar Association (2002).

[6] In *Marketing Warfare,* authors Al Ries and Jack Trout wrote the now famous line about marketing: "The perception is the reality." ("There are no facts in a human mind. There are only perceptions. The perception is the reality.") *Marketing Warfare,* McGraw-Hill (2006), 44.

for the entire case and for each individual subprojects. The words "good enough" are sometimes sufficient for certain non–mission critical tasks.

Why Litigation Teams Fail

Litigation teams fail—defined as not achieving the mission—usually for three reasons: (1) poor planning, (2) poor protocols, or (3) poor leadership. First, if you fail to plan, plan to fail. Expensive endeavors, such as launching and conducting fact discovery, are often commenced without thoughtful planning. Before significant time is spent and legal spend incurred, the team should define the mission (Chapter 2), assess the risk and/or upside opportunity (Chapter 7), create a discovery plan (Chapter 8), and create a litigation budget consistent with the core constraints (Chapter 9). Absent proper planning, the team will incur significant legal spend without increasing the chances of achieving the mission. Careful planning should continue through trial.

The absence of effective communication and work product protocols will cause poor execution of the strategic plans at the tactical level. The team must know the right way to communicate with each other via e-mail and during team meetings and have clear format guidelines for any key work product.

Someone on the team must take responsibility for both the day-to-day and strategic management of the complex case. In my MAP approach, that person is the director. The director is the team member responsible for making sure that all of the good planning isn't wasted and the plans set are the plans executed. A complex case doesn't manage itself. Many project teams fail because no one is appointed as the director. Or a director is appointed, but the appointee fails to step up and lead the team.

The Problems With a Military/Hierarchical Structure

In many high-risk, complex cases, the default organizational structure used is a traditional military or hierarchical organizational structure. The team is managed in a bottom-up/top-down manner. Information flows up to the director or lead lawyer from the lawyers and staff working on the key areas of the case. The director or lead lawyer processes that information, decides strategy, and then provides the executing instructions back down to the team. In this organizational structure, one person makes all critical decisions because he or she is serving as the project lead for the entire case.

Under this structure, the case is organized as if it comprises *a single project*. Decision-making responsibility is not in the hands of the lawyers doing the

work on the major areas of the case (i.e., the projects comprising the program), but instead resides exclusively with one lawyer. This structure may work on a small case, but not a large, multifaceted case. This structure breeds several problems:

1. Disproportional time spent by team members.

Because one lawyer manages the entire project and serves as the global project lead, the time spent by that lawyer is disproportional to time spent by the other team members. If that lawyer insists on involvement in *every* decision no matter its importance, that lawyer must be all-knowing on everything to make every decision. This will cause that lawyer to spend the most time on the case. This is suboptimal. Key decisions will get delayed. The lawyer will burn out. Other team members will not make quick and necessary frontline decisions because all decision authority resides with one lawyer.

2. Compromised tracking of tasks/assignments.

As the global project leader, that one lawyer is responsible for tracking all events and *every* task. In a large case this is impossible. There are too many things to track. Much of the lawyer's time will be spent on just listing and keeping track of all of the action items, instead of leading the team on more global, mission critical matters.

3. Poor and slow decision-making.

This hierarchical structure can also infect the team with "captainitis."[7] Captainitis occurs when a leader assumes all problem-solving responsibilities and when team members opt out of responsibilities that are properly theirs.[8] When captainitis strikes, the team also loses the power of parallel processing, which allows the director to distribute problem-solving decisions to team members. (See discussion in Chapter 5: How to Direct the Team.) Without parallel processing, the director must perform problem-solving steps sequentially, extending the length of the decision path.

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[7] *See* Robert B. Cialdini, "The Perils of Being the Best and the Brightest," *Becoming an Effective Leader,* Harvard Business School Press (2005), 174–182.

[8] *Id.,* 174.

4. Overwhelming communication flow.

E-mail is the primary form of written communication in nearly all complex cases and it's often overwhelming. Usually the e-mail generated and flowing out in the communication lines is mostly needless and definitely not mission critical. Needless e-mails waste precious time. Instead of spending time on thoughtful analysis and executing the project plans, team members spend their time plowing through and deleting e-mails. If the global lead is positioned at the center of the project, is decider of all things, and insists on being copied on *all* communications, that lawyer will be the most burdened with the overwhelming e-mail.

A Better Approach

A better approach treats the complex case as a program comprising several highly interrelated projects. Rather than the director serving as the global project lead, the director is the *program* lead, with other lawyers as the *project* leads. This structure may appear to look like the military organizational structure just discussed, but there are profound differences.

Rather than the director running the entire case as one consolidated project, the case is segmented by its separate projects. A project lead is appointed to run each of these separate projects comprising the program—e.g., liability, damages, and administration. The director is responsible for the program and keeping the team on track to achieve the mission. (But job one for every team member is achieving the mission.) The project leaders are responsible for their assigned projects. The director must be involved in matters that are program related or mission critical. But matters exclusively project related are the responsibilities of the project leads and must be managed by the project leads, as opposed to the director.

The time spent by the team members will be much more proportional. The time spent by the project leads should be equal to (or more than) the director's because they and their team members are the team members completing most of the tasks within their projects. Another benefit is the director won't burn out.

The decision-making process will improve and quicken because the project leads have decision authority on their project-related issues. The project leads can and should consult with the director on project-specific issues. If the team is running correctly and smoothly, there will be an effective and productive communication flow across the entire team, which will produce good decisions. The project leads must involve the director in mission-related or mission-critical

decisions; and the director should involve the project leads in any key decisions to avoid captainitis and take advantage of parallel processing.

The amount of e-mail in the director's and team's e-mail boxes will precipitously reduce. The project teams can and should communicate among themselves on matters exclusively project related. The project leads should communicate with the director on matters that are mission related. (Also, because of the importance placed on face-to-face discussions and team meetings, the team won't debate important strategies via e-mail.)

Ten Project Management Directions to Apply to Your High-Risk, Complex Case

With the previous background in mind, I offer ten directions for running a case as a program of interrelated projects. (I applied these ten directions to numerous cases. They work.)

1. Structure the complex case as a program, not a project.

The complex case should be structured as a program with separate—but closely interrelated—projects. Remember the definition of a program: "[a] group of related projects managed in a coordinated way to obtain the benefits and control not available from managing them individually." Apply this definition as the overarching organizational structure.

2. Have a director of the program and project leads for the projects comprising the program.

The director of the complex case serves as the program lead, and the lawyers running the major areas serve as the project leads for the projects within the program. The director has responsibility for the program; the project leads have responsibility for their specific projects. The team must honor, respect, and follow these divisions of responsibilities.

3. Appoint and anoint the director.

The director must be appointed and anointed either by the client or the lead lawyer (or the person with ultimate authority to appoint and anoint) to serve as director of the program. The director's authority to manage and direct the team can't be questioned by the lead lawyer, the client, the project leads, or any other members of the team.

4. The director must step up and lead the team.

Once appointed and anointed, the director must step up and lead. This means the director must set the communication and work-product protocols, set and track mission critical tasks deadlines, and run effective team meetings. Similarly, the project leads must take full responsibility and lead their specific project teams.

5. The director must allow the project leads to run their projects without interference.

The project leads must be similarly given authority to run their projects with supervision and direction from the director, but not interference.

6. The team must create and follow communication protocols.

The director and the project leads must agree on and make it a priority to follow the communication protocols to guide, control, *and limit* internal and external communications.

The team must place vigorous limits on e-mail. This will dramatically improve the communication flow, the team's focus, and place greater importance on team meetings. The litmus test for e-mail communications can be distilled down to this question: Is this program related or project related? If the communication is program related, then the director receives it. If it's project related, then the distribution should be confined to the project team members who must know the content of the e-mail.

7. The team must agree on and follow work-product protocols.

Again, the director and the project leads must agree on and make it a priority to follow the work-product protocols. The protocols must be followed by the entire team—meaning no lone wolves doing their own thing or their own way. To put it another way: "One band, one sound." (A quotation from the movie *Drumline,* about a marching band.) This rule requires that once the protocols are set by the team, they are followed, such that all work product is uniform in both the appearance and the structure of the content.

8. The director must insist on face-to-face or person-to-person discussions on key strategy issues.

The director and the team members must constantly ask this question: "Can this [problem, issue, topic, etc.] be saved for a team meeting?" If so, save it for the team meeting. Talking to each other either face-to-face or by phone reduces e-mails and fosters better decisions. This is true even if the discussions and decisions are made in fifteen-minute team huddles. Thoroughly vetting an issue in a face-to-face meeting produces far better decisions than debating an issue via lengthy e-mail exchange.

9. The director must run regular and effective team meetings.

The director and the project leads must run effective and regular team meetings. Chapter 5 discusses three different types of meeting structures to employ: (1) Daily Huddle Meeting (during crunch times only), (2) Weekly Tactical Meeting, and (3) Key Strategy Meeting. Each structure is designed to achieve a different purpose.

10. The team must make practice part of its culture and ethos.

We use the expression, "the practice of law." It is called that for a reason. The team must practice and prepare for any major presentation to a client, judge, or jury. This means standing up and mocking presentations to peers or non-peers and mirroring the actual presentation conditions. Practice—like the After Action Review—is grossly underutilized by litigation teams. Lawyers believe they are ready for a presentation when they are not. Getting ready doesn't mean flipping through a large deck of PowerPoint slides the morning of an important presentation. It means standing up and deliberately rehearsing—just like athletes, actors, and skilled presenters do. The director must insist on deliberate practice sessions and the team must make practice part of its culture and ethos.

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Following my ten directions will not change the facts or the witnesses you and your team are blessed or cursed with in your case. Following these directions should, however, help to avoid program failure and improve the chances that the client perceives that the team delivered value for the services rendered.

Discussion Questions

1. From a project management perspective, how is your team structured, e.g., as a program with interrelated projects? Or is the team structured as a single project with the lead lawyer (or a single lawyer) making all of the decisions and the other team members reporting up the chain of command to that team leader?

2. Is the structure of your litigation team intentional (or planned), or did it just evolve into its current structure? Either way, does the structure work? If so, why? If not, why not?

3. Does your team suffer from any of these problems:

    a. Disproportionate time spent by one lawyer or a small group of lawyers?

    b. Compromised decision-making?

    c. Overwhelming and out-of-control e-mail communications?

4. If you answered "yes" to any question in (3), what is the cause of the problem and what can be done to fix it?

5. How will your team implement or apply the ten directions?