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On Litigation

In a series of LinkedIn posts (compiled below), I am posting about litigation and legal practice under the banner “On Litigation”. The goal is to build a connected series of short reflections on what it means to be an effective litigator – one post at a time.

Part 1: Introduction

Those who know me know that, in addition to practicing law, I love to write. Over the years, I’ve written full-length journal articles, book chapters, and a steady stream of blog posts. But I’ve always wanted to write a book.

The topic I’ve long envisioned tackling in book form is broad: litigation. When I say “litigation,” I don’t just mean courtroom advocacy, although that’s certainly part of it. There are already excellent texts devoted to oral advocacy. What I have in mind is something broader: a synthesis of the insights, habits, approaches, and decision-making frameworks that great litigators rely on to navigate complex disputes. Put differently, what are the skills, strategies, and tactics that underpin success in complex litigation?

A great litigator, in my view, is someone who can shepherd a dispute from start to finish –maximizing the likelihood of achieving outcomes that matter to the client. I’ve had the privilege of working with and against some exceptional litigators in the course of my work. From observing them, I’ve come to believe that great litigators tend to combine many (if not all) of the following:

- Command of procedure and the rules of evidence
- Deep understanding of the relevant substantive law
- Strong courtroom presence
- Clear, persuasive writing
- The ability to tell a compelling story
- Leadership and team management skills
- Excellent judgment

If I ever do write that book, it won’t be about any one of those skills in isolation. Rather, it would try to weave them together, into a comprehensive picture of what makes a litigator truly effective in high-stakes, complex disputes.

But writing a book will have to wait. Between a busy practice

and three young kids, now is not the time for a long-form project.

What I can manage, for now, are LinkedIn posts.

Part 2: What Are We Doing When We Litigate?

Before diving into how we should litigate, it's worth asking a more foundational question: what are we doing when we litigate?

"We try to win cases for our clients" is a common answer, but it's too narrow. Most of what we do happens outside court. "We solve problems for our clients" is broader, but not very useful. That describes every professional.

So, can we define our work in a way that is both accurate and illuminating? I think we can.

Before law school, I studied economics. I later completed a master's degree in economics alongside my JD, and I've taught economics courses, including graduate-level classes on the economic analysis of law. I work closely with economists in my legal practice. So it won't surprise anyone that I think economics offers a helpful lens for thinking about litigation.

From that perspective, here's how I would define what we're doing when we litigate: "We act strategically, under conditions of imperfect information, to optimally advance our client's goals in relation to the expected scope of a dispute."

Let me unpack that. In brief for now, with longer posts to follow.

"Strategic action" means anticipating your opponent's response. Litigation is a game. Not in the sense of being trivial or fun (though it sometimes is), but in the game-theoretic sense: the outcome for each party depends not just on their own actions, but on the actions of others. Your choices shape your opponent's moves, and vice versa. Great litigators think in chains of action and reaction, several steps ahead.

"Imperfect information" is everywhere. Your opponents know things you don't. But more importantly, no one knows exactly how a witness will testify or how a judge will decide. Litigation is human, and humans are unpredictable. Great litigators don't fear uncertainty; they harness it.

"Client goals" can be broader than just winning the case. Sometimes the objective is minimizing cost, protecting reputation, avoiding precedent, or something else entirely. Often, these goals compete. Great litigators know how to weigh those trade-offs.

The "expected scope of the dispute" matters. We're not optimizing for today's motion; we're optimizing for the entire

trajectory of the case (or a portfolio of cases). Sometimes that means fighting hard. Sometimes it means retreating. But always with an eye on the bigger picture.

So why does this definition matter?

Because it shows why litigation can be challenging: not because the law is complex (though it can be), but because the decisions are. You're making judgment calls with limited information, against smart opponents, trying to chart the best path for your client not just now, but years down the road.

That's why judgment is so central to great litigation. And while experience builds judgment, so does thoughtful preparation and careful reflection.

Part 3: Strategic Thinking in Litigation

Thinking and acting "strategically" isn't about being clever or theatrical. It's about anticipating your opponent's likely responses to your moves, and shaping your own actions with those responses in mind.

In game theory terms, litigation is an extensive-form game: a branching decision tree where each side's optimal choice depends on how they expect the other side to act later. But an extremely complicated one. Game theory students work with neat diagrams of four or five decision points, a handful of options, and tidy probabilities. Litigation is a different beast. A single case can involve hundreds, sometimes thousands, of decisions, with multiple options at each turn and shifting probabilities as the facts and law evolve.

The clearest example is cross-examination. A skilled cross-examiner (almost) never asks questions blindly. Entire lines of questioning are built around a reasonable expectation of the witness's answers. Every question is informed by the likely range of responses from the witness. That makes cross-examination one of the purest exercises in strategic decision-making in our craft.

But strategy doesn't stop at cross-examination.

Every meaningful decision in litigation – from pleading choices to motions, from discovery requests to trial tactics – will provoke a reaction. The quality of your decisions often depends less on their standalone merits and more on how they will influence what your opponent does next.

Take this example. A plaintiff has a strong \$1 million breach of contract claim, but counsel can make a good-faith case for \$10 million. The larger claim might pressure the defendant toward a faster settlement and make \$1 million seem “reasonable” by comparison.

Or it might backfire.

The defendant could respond by escalating: engaging in a no-stone-unturned approach that uncovers new defences, demanding broader discovery, and pushing the matter into a slower, more expensive litigation track. The defendant may refuse mediation, seeing the plaintiff as unreasonable. And at trial, a judge may be more skeptical of the entire case if the bulk of the damages claim doesn’t hold up.

The lesson isn’t that bigger claims are always good or bad. It’s that there are no universal rules. The right move depends on the context: the parties, the lawyers, the tribunal, and the personalities in play. The best litigators take the time to understand their opponents, their opposing counsel, the decision-maker, and even the key witnesses. The more they understand those actors, the better they can predict reactions and craft actions accordingly.

We can’t know with certainty how an opponent will respond. But uncertainty doesn’t mean ignorance. It means we think in probabilities, not absolutes.

Part 4: Thinking About Probability

I described how strategic thinking in litigation means looking ahead: if we take this step, what will our opponent do next? The challenge is that we never know with certainty how an opponent will respond. What we’re really doing is estimating probabilities of the different things that might happen. So strategic thinking depends on thinking about probability correctly.

But people aren’t always good at thinking about probability. Behavioural economics has catalogued a lot of ways in which our thinking about probability can be skewed. There’s too many to go over here, but here’s a handful that apply in the litigation context:

- The Availability Heuristic. We overestimate the likelihood of outcomes that are vivid or fresh in our minds. A lawyer who just won a trial of a certain type may treat that experience as highly predictive of the next case, even though the facts differ materially.
- Anchoring. Initial numbers or positions exert undue

influence. A plaintiff's inflated damages claim or an aggressive scheduling proposal can shape settlement ranges or procedural timelines, even if the starting point is unrealistic.

- **Overconfidence Bias.** Lawyers, like professionals in many fields, tend to overstate the accuracy of their judgments. Predicting a "strong" chance of success on a motion may feel justified, but the reality may be closer to a 50-50 case than counsel's confidence suggests.

Each of these heuristics distorts how we perceive probability. And when we misperceive probability, we risk misjudging our opponent's likely moves, a judge's reaction, or the strength of our own position.

The solution is to recognize our biases and think carefully and systematically about probability. With experience, one's heuristics may improve, but even experts' intuitions can be biased. So think carefully and systematically whenever possible.

How do you do that? There's no substitute for spending the time thinking through the likely outcomes, based on as much information as you can have about the facts, the law, and your opponent.

Speaking for me personally, I find it useful to make explicit probability estimates for critical decision-points, expressing the likelihood of outcomes in percentages rather than vague adjectives. I often model different scenarios with different probability assessments to stress-test how my own assessment impacts the best course of action. Not because the numbers or the scenarios are necessarily "right", but because it keeps me honest as to how I'm evaluating the best course of action rather than relying purely on gut or heuristics.

However you approach the problem, strategic litigation demands disciplined thinking about probability. Only by confronting risk explicitly can litigators make decisions that reflect both where we want to go and identify the highest likelihood path of getting there.

Part 5: Signaling

Great litigators are strategic thinkers: in deciding what the right move is in any case, they anticipate how their opponent might respond. But strategic thinking goes beyond anticipating an opponent's response. It also requires thinking about what information your actions convey and, in turn, what that reveals about your strategy.

That implicates the concept of signaling. In economics, signaling describes how actions convey information beyond

their immediate effect. Michael Spence, who won the Nobel Prize for his work on signaling in markets, illustrated this through education: a degree is not just about gaining knowledge, but a “signal” of ability or perseverance to employers.

Litigation is no different. Every move we make signals something to our opponent, and every move they make signals something back. For example:

- Proposing mediation early. This might be read as eagerness to settle, leading the other side to infer you will accept less (or pay more).
- Broad discovery demands. These can signal an intent to pursue no-stone-unturned litigation, indicating a desire to make the process time-consuming and expensive.
- Trial scheduling. Pushing hard for an early trial date can signal eagerness to have the matter decided, suggesting high confidence in the case.

The key is that signaling cuts both ways. We must be alert to what our own actions communicate, since a sound step might inadvertently send our opponent information we'd rather they not have. At the same time, we should read the signals embedded in our opponent's conduct: their procedural choices, timing, and posture often contain valuable clues about how they assess the case, their client's risk tolerance, or their appetite for settlement.

Failing to account for signaling can cause missteps. Consider a party that proposes early mediation as a good-faith effort to resolve matters efficiently. If they overlook that it also signals eagerness to avoid trial, they may enter mediation unprepared for the other side to demand more movement than expected. That doesn't mean you shouldn't pursue early mediation to settle efficiently; it means you must be attuned to the signals your actions convey and take steps without inadvertently communicating what you don't intend.

Litigation is a dialogue. Our actions are part of an ongoing exchange of information, sometimes explicit, sometimes subtle. To be a great litigator, you need to learn to read and convey signals in ways that make that dialogue favourable to your client's position.