

# Before You Bet The Company: Know The Odds – Know The True Stakes

The Editor interviews **Charles A. Blixt** and **Judge Walter D. Kelley, Jr.** about Jones Day's new *Litigation Risk Assessment Service*.

**Editor:** Please tell us about the **Litigation Risk Assessment Services** and why it was created.

**Blixt:** Abraham Lincoln observed that war is too important to be left to the generals. In the same way, broad strategic decisions about critical corporate litigation sometimes may be too important to leave entirely to the inside and outside counsel who will be tasked with carrying them out. Of course Jones Day will always counsel clients on the risks of litigation, the options for settlement, and competing legal strategies, and we will always provide the client with what I believe are the best trial lawyers anywhere. But we believe that there are situations, even for our own clients, where there will be value in obtaining a global assessment of strategic options from uniquely qualified specialists who are independent of the trial team. The Firm realized that, with the arrival of Walt Kelley from the Federal bench, and given my long-term experience with bet-the-company litigation, we now had the critical mass to create just such a unique service.

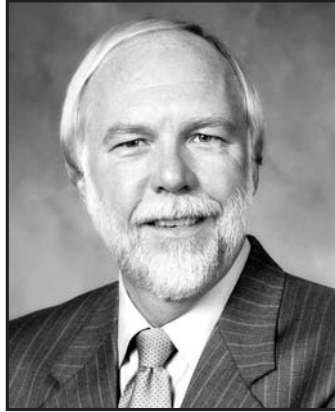
**Editor:** Would you please tell our readers about your corporate and legal background?

**Blixt:** I started my career as a litigator and the last ten years I had the privilege of serving as Executive Vice President and General Counsel of R.J. Reynolds Tobacco Company and Reynolds American Inc. I was at Reynolds for over 20 years, focusing on tobacco litigation issues. Prior to joining Reynolds I was at Caterpillar Tractor Company for four years, handling product liability litigation. I currently serve on the board of directors of three public companies, two private companies involved in technological solutions to litigation support and discovery issues, and I am a Senior Advisor to Jones Day.

**Editor:** Judge Kelley, would you tell us about your experience and how it relates to this new initiative?

**Kelley:** Like Chuck, I also have a litigation background. Prior to becoming a federal judge, I spent 23 years litigating business disputes that ranged from complex antitrust and intellectual property cases to the failed sale/lease-back of a downtown office building. More than 25 of these cases were tried to verdict before juries.

I continued to see a broad range of cases while sitting as a judge in the Eastern District of Virginia, but my perspective on them shifted. No longer did I have the luxury of going into a hearing or trial knowing who should win – my client, of course. I had to weigh the strengths and weaknesses of legal arguments and then calibrate my judgment against the latitude given me by the Court of Appeals. I had to gauge credi-



Charles A. Blixt

bility of lawyers and witnesses and develop an overarching sense of the equities. My evaluation of a winning argument changed somewhat because I had new factors to consider.

This new perspective was reinforced by my regular practice of interviewing juries once they had rendered a verdict. This is a luxury denied most lawyers. I had tried a lot of jury cases, so I thought I had a firm understanding of jury decision making. It turns out I knew only the half of it. Juries are very contentious in their analysis, but their logic train differs from that of trained lawyers. They don't analyze by working through the elements of a cause of action; they use common sense to decide who has acted appropriately and then work backwards to make sure their common sense judgment loosely conforms to the jury instructions. They remember and rely upon the broad themes of a case.

**Editor:** Generally, speaking, how should corporations approach the question of settlement versus going to trial?

**Blixt:** First, we must recognize that each situation, and each company's approach, is unique. We must also recognize that this eternal question has often been answered incorrectly. Frequently the only calculation made is the chance of winning at trial, and that is clearly what the trial team should be evaluating.

I'll let Walt Kelley talk about evaluating a case's chances at trial. My concern is that corporate managers are not always accurately assessing the risks beyond the courtroom. What is the impact of strategic litigation decisions on consumers, vendors, regulators and, ultimately, shareholders? What is the impact of those decisions on potential future litigation? Clearly there is much more to be gained or lost than dollar damages. Even if we can quantify the chances of winning at trial at 75 percent, when is that a bet worth taking? Conversely, if we quantify the risk of losing at 75 percent, is that still a bet worth taking? What are the true short- and long-term costs of defeat?

**Kelley:** As Chuck said earlier, good trial lawyers have always been in the business of evaluating their chances and, one



Judge Walter D. Kelley, Jr.

would hope, communicating that to clients. But viewed from the other side of the bench, I have to tell you that the process often appears dysfunctional. Some of this is understandable. Good trial lawyers are supremely confident of their ability to persuade. And even the best lawyers can be hesitant to point out incongruities in a client's story lest it appear that they don't believe in the case. These two factors sometimes combine to produce a major miscalculation that could have been avoided. What Chuck and I want to do is act as a circuit breaker that prevents such miscalculations from shorting out the business.

I should add that the choices companies face are not always binary, *i.e.*, litigate or settle on your opponent's terms. For example, alternative dispute resolution, such as mediation or an advisory opinion from a neutral, can help narrow issues enough to find an acceptable middle ground. There are lots of ways to get to an acceptable business solution, and these alternatives need to be explored.

**Editor:** Assuming the option of settlement has been rejected, how should litigants choose among potential trial strategies? How would your "third party" advice be helpful?

**Kelley:** First, the company and its trial counsel need to define the "preferred most likely outcome." For example, not all defense cases can be won on liability. Sometimes holding down the damages is the best you are likely to do, but it is an acceptable business outcome.

Once the goal is defined, you build a theme around the narrative that will get you there. As lawyers, we are taught to identify and argue a series of alternative points. We learn the phrase "*assuming arguendo*" in our first semester of law school. Juries don't think that way. They want to know what actually happened, not several possible scenarios. If your defense is damages, put all your effort into that. Tell the story of how your client erred, but the plaintiff was not really hurt. Don't pick at the fringes of the plaintiff's liability case if you are trying to sell something that no regular person is likely to buy. It hurts your credibility and diverts attention from the likely preferred outcome.

Since returning to private practice, I

have been retained to preside over a number of mock arguments and mock trials. The goal is to refine legal arguments and trial themes by subjecting them both to the adversary system and to a fresh set of eyes that focus from the judicial perspective. When you go into court, you need to know what works and what doesn't.

**Blixt:** I believe that many corporate executives, and even some in-house counsel, confuse litigation strategy with litigation tactics. The entire team should set the strategy, and I believe an independent review can be of value in that assessment. Once the strategy is set, my view is that you let the trial lawyers make all critical tactical decisions, without interference from the back benchers.

**Editor:** Our readers love examples. Are you aware of any cases where a fresh set of eyes might have averted disaster?

**Kelley:** A recent case illustrates the value of both merit review and collateral consequence review. A high-tech company sued a fringe competitor for patent infringement based on the design of certain silicon chips. The competitor counterclaimed, alleging that its own patents preempted the field. The patents at issue involved the company's principal technology, but a relatively minor part of the competitor's portfolio. The competitor offered a no fee cross-licensing deal which the company rejected because its trial counsel evaluated the case as a sure winner. The judge not only found for the competitor, but recommended that products containing the company's chips be barred from entering the country. This preliminary order, which was highly publicized, caused high anxiety – and some defections – among the company's customers who purchased the chip to install into products that they, the customers, imported into the United States. The proposed order would put both the company and its customers out of business.

A fresh set of eyes looking at the merits likely would have evaluated the case as at least a toss up. An evaluation of the business consequences would have identified the potential damage to the company's customer base and highlighted for discussion the wisdom of putting the company's main technology at risk under these circumstances. Hindsight is, of course, 20/20, but the kind of review that Chuck and I offer is as close to real-time hindsight as possible.

**Blixt:** I hate to point fingers at my colleagues, so I will use a historical example from many years ago – the Ford Pinto litigation. I have always been convinced that early application of broad strategic thinking could have avoided the disasters of that litigation, and would have had a substantially different impact on the ultimate litigation, the company's shareholders, and at least the short-term reputation of a great American company. That is the kind of thinking and analysis that I believe this new team can bring to major litigation issues.

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