

Early Case Assessments

Rein in Costs and Identify Risks

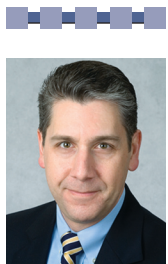
By Stephen M. Prignano



Despite committing tremendous resources to the defense of civil litigation, many corporations tend to follow a relatively predictable defense model that has not changed substantially over the years.

The process is largely reactive, inefficient and costly; plaintiffs take the litigation initiative and defendants respond with a strategy designed to counter a specific action. In this environment, defense strategy tends to become little more than the selection of ever-narrowing choices dictated by the actions of plaintiffs' counsel. Although to a large extent this process is inherent in the chess-like structure of litigation—where plaintiffs always move first—too many companies simply accept this reactionary posture while too few seek to impose their own structure on the litigation process. As a result, a corporate defendant's handling of a case resembles more of a passenger along for a ride rather than a driver in control of the bus.

An effective early case assessment ("ECA") allows corporate legal departments to exert better and more informed control over litigation, monitor and identify litigation trends to control costs, and develop methods to resolve cases more quickly. An effective ECA process is dynamic and may vary considerably with the nature of the litigation, but includes many of the following elements: (1) creating a multi-layered ECA team committed to the process of developing and implementing a comprehen-



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sive litigation strategy; (2) developing and implementing an ECA plan and litigation budget; (3) creating a litigation infrastructure using discovery and knowledge management technology; (4) developing a public relations strategy; and (5) conducting after action reviews to “audit” the effectiveness of the ECA plan and make adjustments for the development of future plans. The remainder of this article will explore in more detail each component of the ECA process.

Developing an Early Case Assessment

The goal of an ECA is to develop an informed, comprehensive strategy to the defense of a case virtually from the inception of the matter. Developing a solid base from which to make long term strategic decisions at the beginning of the case allows the legal team to plan for and focus on those activities that will have the most influence over the outcome. To achieve this, a basic change of management philosophy is needed. Unlike the “strategize-as-you-go” approach, the data gathering and analytical work must be comprehensive and must be front-loaded at the beginning of the case. That early work must then drive the implementation of the strategy for the life of the case and, if done correctly, require only modest course adjustments as the case progresses.

In order to create a useful ECA, the litigation team needs to investigate the facts and think through every phase of the case within three to six months of the inception of litigation. Utilizing this approach, the process of interviewing witnesses and gathering essential documents does not wait until a notice of deposition or document request is received. Important witnesses must be identified and interviewed, key documents located and examined, and essential legal positions thoroughly explored. Members of the legal team must be assigned specific tasks and the activities of the investigation must be coordinated closely by team leaders. Follow up interviews with witnesses as additional documents and/or facts come to light is essential.

Additionally, electronic documents and communications should not be overlooked in the investigatory process. All electronic communications from key employees related to the subject matter of the litigation must be identified and preserved,

including file attachments associated with those communications. In this regard, the implementation and management of litigation holds, the interruption of document retention policies, and the preservation of evidence (electronic or otherwise) becomes a key mission of the investigative team.

To ensure that the matter is completed during the prescribed period, the ECA

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should include benchmarks against which the progress of the litigation can be tracked. Meetings with key personnel should be held at regular intervals, and an open line of communication between in-house and outside counsel should be maintained to ensure that tasks are completed on schedule. Though there should be an effort to complete as much of the work up front as possible, the work should be tailored to the overall complexity of the matter and potential exposure to the company. Whenever necessary, key management and legal decision makers should also be included in the scheduled briefings, or at least informed about the results.

Based on the information gathered during the ECA, the legal team should next perform an objective evaluation of all the information developed during the investigatory phase of the ECA. The facts, both good and bad, should be thoroughly explored. Witnesses should be assessed for their likely impact on the case and jury appeal, documents should be identified and noted for any harmful information that is likely discoverable, and the legal positions of both parties with respect to substantive and evidentiary matters should be evaluated. The team should then outline a defense strategy that includes further discovery, possible motions, use of

expert witnesses, and anticipated staffing for the matter.

During the evaluation process, it is critically important for any ECA to incorporate a business perspective into the case assessment. The legal team must discuss a range of acceptable outcomes with the key business decision makers for the company. In order to prepare an effective ECA, counsel must have a comprehensive understanding of the larger business climate in which the company operates, and must have a frank discussion with key business people regarding the realistic objectives of the litigation. A favorable jury verdict after an extended period of litigation will be of little consolation if the company’s reputation has been ruined in the process, or if the economic cost of that hard-earned victory far exceeds a settlement demand available to the company at an earlier point in the litigation.

After having analyzed the facts and the law, and determined the various possible courses of action during the litigation, it is next incumbent on counsel to engage in a decision analysis. By focusing on the key events and decision points of the various possible litigation scenarios, counsel can begin to chart a plan of action that will enhance the chances of achieving an acceptable resolution of the matter. For any litigation alternative, the outcome of several key events will likely determine the final resolution of a litigation strategy. Probabilities can be assigned to the outcome of key events in the various scenarios to help counsel and the client evaluate and select the litigation strategy that has the best chance of success. This decision tree model of analyzing potential outcomes is both useful for managing the complexity of litigation alternatives and for bringing a measure of objectivity to the ECA.

The ECA Team and Role of National Coordinating Counsel

Perhaps the most important component of an effective ECA strategy is the team that will develop and implement the process. An ECA team draws from a variety of disciplines to ensure that the ECA represents a comprehensive resolution strategy. The team consists not only of in-house counsel charged with the overall responsibility of overseeing and implementing the

ECA, but also includes qualified national and local counsel who partner with the in-house expertise to develop all facets of the assessment.

In this regard, the role of national coordinating counsel is critically important in the development of the ECA. The burdens on in-house counsel are many and varied. Few in-house legal departments are fully equipped to handle all of the demands of complex multi-jurisdictional litigation. National coordinating counsel can serve a vital role in coordinating the litigation activities of multiple local counsel across many different types of litigation. National counsel can also achieve economies of scale by helping to standardize the discovery practices of the company, thereby ensuring that the company's litigation response is consistent from jurisdiction to jurisdiction. Finally, by utilizing national counsel as the primary point of contact with local counsel, in-house counsel is freed from this burden to focus on larger litigation management and strategy issues.

The role of national counsel in developing the ECA parallels its traditional role in managing diverse litigation. National counsel can provide invaluable assistance during the investigatory phase of the ECA because of its experience with similar litigation and issues across the country. National counsel can also lend important expertise to developing a successful case strategy, since counsel can draw on experience with litigation strategies that have worked in a wide variety of litigated matters. After the parties agree on an ECA litigation plan, national coordinating counsel will also have the responsibility of implementing the strategy. By delegating the duty of implementing the litigation strategy to a single law firm, as opposed to multiple local firms, the company is able to ensure that it projects consistent legal positions and themes during litigation in multiple jurisdictions, and that its in-house legal team is focused on the broader strategic issues that drive the ECA.

Using Budgets to Manage Costs

As with most business decisions, an ECA should include a detailed budget as an essential forecasting tool and to help control the costs of litigation. In-house counsel should require that outside counsel submit

budgets at the beginning of the year, and for each matter. It is estimated that 76 percent of in-house counsel require a budget from national counsel, and approximately 56 percent of them require outside counsel to submit a budget for each matter. By requiring a budget, in-house counsel is in a better position to evaluate, at an early stage of the litigation, the likely costs associated with various litigation alternatives. Combining the budgeting process with the ECA also means that litigation budgets should be more realistic than traditional "seat of the pants" estimates normally encountered at the inception of litigation. Since the ECA process places heavy emphasis on the early investigation and development of facts, the budgeting process should clearly benefit from the greater level of detailed information available at the start of the case. More accurate budget forecasting, in turn, means that the company can engage in more confident decision making, with fewer surprises.

The budgeting process also serves as a core benchmark for the success of the ECA. As the legal team implements the strategy outlined in the ECA, it is essential that progress be evaluated against the backdrop of the litigation budget. If a realistic budget was developed at the inception of the matter, the budget can offer useful guideposts for determining if the strategy is being implemented properly. In this regard, in-house and outside counsel should confer periodically to evaluate the success of the ECA and determine whether budget goals are being achieved, whether course corrections to the ECA strategy are required, or whether different tactics should be employed in implementing the ECA. For instance, counsel may decide that contract attorneys could be employed to conduct certain discovery tasks at a substantial cost savings, or that internal resources could be better used to conduct interviews, review depositions and perform related tasks. Finally, budgets may also help decrease litigation costs by providing outside counsel with an incentive to resolve matters in a more cost-effective manner. Utilizing budgets, fee arrangements can be created that reward outside counsel for meeting ECA deadlines, or disposing of a matter earlier than originally anticipated.

Development of Discovery and Knowledge Management Systems

In order for an ECA to be effective, it must be implemented in a cost-efficient manner. Because discovery accounts for nearly 75 percent of all litigation costs, developing a method to conduct discovery more efficiently can have a significant impact on the ECA budget. Fortunately, various technologies are available to litigators to manage and control large volumes of information in complex litigation. Discovery and knowledge management systems typically allow counsel to collect and organize documents and data from different sources into a single computerized database that enables efficient search and retrieval of relevant information. These systems also contain extensive reporting features that allow counsel to analyze materials more quickly than with traditional paper based systems. Most discovery management systems also include web-based applications that allow remote users to search electronic documents for relevance, responsiveness and privilege, among other things.

The development of a discovery and knowledge management system should not be viewed as a new process to be applied to every case, but should be thought of more globally. One of the key efficiencies in developing an ECA strategy with national counsel is to achieve a scalable solution to the complex problem of managing discovery. Thus, discovery databases should serve a broad spectrum of cases and be managed by in-house and national coordinating counsel. The databases should be viewed as an organic undertaking, growing with the addition of new cases, and providing defense counsel with greater efficiency in responding to litigation as the databases grow.

Just as important as document organization and storage, however, is the need for discovery management systems to provide collaboration and real time access to materials by all members of the litigation team. This is especially important when in-house counsel, national coordinating counsel and local counsel, who are often located in different parts of the country, all need access to the same documents, discovery, depositions and other case information. Economies of scale can be achieved where all three parties have access to a standardized database of materials that allows the parties to collab-

orate with each other in reviewing and analyzing data that is critical to the case. Any discovery management system, therefore, should provide users with real time, online access to all documents associated with the case. Users should be able to access the system securely at any time, from any location. The ability to retrieve relevant documents on demand, from any location, substantially reduces the inefficiencies inherent in reviewing and drafting documents, and lends efficiency to the ECA strategy that cannot be achieved by other means.

Developing a Public Relations Strategy

Developing a public relations strategy has become an imperative for companies involved in litigation, and also forms a key element of an effective ECA. Today's sophisticated plaintiffs' counsel make effective use of the media, and the traditional "no comment" response will rarely be an effective response to a public relations crisis. At the same time, a company that does not carefully control its message in the immediate aftermath of a public relations crisis not only risks making the crisis worse, but will likely give plaintiffs' counsel additional fodder for the litigation. Companies faced with litigation need to be sophisticated in communicating effectively, delivering a message, and molding public opinion.

To implement a public relations strategy, in-house counsel must first organize a public relations team capable of performing the necessary tasks. The public relations team should be comprised of trusted, key personnel of the company, and must work in close collaboration with the legal team, outside public relations advisors, and key business executives to develop a comprehensive media response to the litigation. The team should include a PR "point person," who should be kept informed of all significant litigation matters and, in the case of an emergency, be immediately accessible. The designated point person should be highly regarded in the community and have a good relationship with members of the media. Moreover, the public relations team should have access to key management personnel and any important documents.

The ultimate goals of the public relations strategy are to influence the media's cover-

age of the litigation and defuse the PR crisis. The public relations team must manage communications with the media throughout the course of a legal dispute that may affect the litigation, or its impact on the company's overall reputation. Any effective public relations strategy must make use of the media to convey the company's position accurately. In order to implement

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a public relations strategy effectively, therefore, it is essential that the company must develop good relationships with the media and appear cooperative.

Depending on the nature of the crisis, the strategy should include involving the general counsel, CEO, board members and other high-level decision makers in the process. Key personnel for the company should be trained in effective media communications. The public relations team must also closely review all coverage of the event to ensure that the facts are being accurately reported by the media. Additionally, any personnel who have contact with the media must provide relevant information to the public relations team. Finally, the public relations strategy should be continually reviewed by the company, updated and changed, if necessary, as the public relations crisis unfolds.

As with the overall philosophy of conducting an ECA, the key to managing the public relations aspects of litigation effectively is to seize the initiative and get out ahead of the story. In responding to a public relations crisis, therefore, speed is of paramount importance. The combination of the Internet's ability to make information accessible immediately, along with the 24 hour news cycle, has made rapid media response a critical component of effective public relations. The inability to respond quickly to a matter could mean that a dam-

aging, and possibly inaccurate, story could run hundreds of times without ever presenting the company's position. In order to keep the team nimble and able to respond rapidly to changing conditions, the team must not be saddled with extensive lines of reporting before getting the company's message out. A public relations crisis is no time for bureaucratic red-tape or endless consultations. A well-thought out public relations team, constituted in advance of any crisis, should be trusted to act with dispatch when the need arises.

The goals of maximizing speed and reducing business disruption can be achieved by forming the public relations strategy and developing a PR team well in advance. By having the strategy already in place, the company is better able to react quickly and effectively during a period that might otherwise be chaotic. Moreover, keeping stakeholders or affected units "in the loop" can reduce business disruptions by allowing them to develop strategies to minimize the impact of any anticipated negative media coverage. Finally, any public relations strategy must also include informing all high-level internal and external decision makers. The public relations team must have a pre-approved list of individuals to contact regarding any potential public relations problems. The team must immediately brief these individuals on the particular issue. Though these individuals may not have a role in developing the company's overall message, they should be individuals who have a major stake in the outcome of the litigation.

The public relations team must also develop a message that presents the company's side of the story in the best possible light. Above all, the message must be accurate—any inaccuracies, real or perceived, will severely damage the company's credibility in a crisis. Not only must a decision be made about what to say and when to say it, but also in what medium the message should be disseminated. In some instances, a press release may be the most effective means of communicating the company's position, but in situations where the effects of adverse publicity are immediate, an interview with television, radio or newspaper reporters may offer the broadest and most immediate means of communication. Of course, any decision involving

the method of communication should also include the company's own website. Websites controlled by the company are among the most important tools at the company's disposal because of their broad reach and ability to control the message closely.

Finally, regardless of what the message is or how it is disseminated, it must also be effective. The public relations team must eschew legalese or industry jargon and develop a message that can be easily grasped by the general public, as well as by members of the particular industry. The message, however, should not be developed in a vacuum, and should be consistent with the company's overall litigation goals. Accordingly, the message should be developed in close consultation with the legal team. Ultimately, care must be taken not to do more harm than good, and the team should ensure that the company's litigation position is not compromised in an effort to respond hastily to a PR crisis.

After Action Review

At the conclusion of the litigation, counsel should conduct an "after action review" to evaluate the effectiveness of the ECA. First, there should be a review of the ultimate goals or intended results of the ECA, and a determination should be made as to whether those objectives were achieved. If objectives were not met, there must be an investigation as to why performance of the ECA was lacking. If objectives were met, in-house and national counsel must look at what can be done to replicate the results, or even improve the results to meet the objectives in future litigation.

As part of its after action review, management should pay particular attention to any flaws exposed in the company's business practices that need to be addressed. Such flaws may include mistakes by employees, improper activities, problems with a particular business policy, or poor communication between management and company employees. It is then important for management to use the lessons learned from the litigation, develop a system to make changes in the company's business practices, and minimize the possibility of the event reoccurring. Management must then effectively communicate these changes to its employees and ensure that they are properly implemented. Where appropriate, training programs should be developed to educate employees on the new practices or policies.

A thorough after action review also serves the important goal of managing, and perhaps reducing, litigation costs. First, the company should compare the ultimate cost of the litigation against the budget forecasts and determine where costs may have been incurred unnecessarily. Alternatively, the company may identify particular litigation strategies or tactics that were not cost effective, given the results achieved. With this knowledge, the company will be in a better position to adjust future budgets and avoid more costly and less productive litigation activities. Second, armed with the lessons learned during the after action review, the company should be able to develop policies or procedures designed to eliminate or decrease the likelihood that a problematic issue will arise again. Even if the issue reoc-

curs, however, management and counsel should be better able to respond to the matter, having already evaluated what practices were effective and ineffective in the prior litigation. A thorough after action review, therefore, is a key component in the ECA process that will better prepare the company to avoid or resolve similar litigation in a cost-effective manner.

Conclusion

Managing the defense of civil litigation proactively and in a cost-effective manner requires defense counsel to break out of the mold of reacting to plaintiffs' counsel. An effective ECA accomplishes this goal by front loading the investigation and analysis at the early stages of litigation, building a defense strategy that is paired with realistic expectations and acceptable litigation outcomes, and managing costs effectively by utilizing budgets and ongoing assessments of the ECA. Implementing an ECA requires the close collaboration of in-house, national coordinating, and local counsel, as well as key executives. It also requires thinking beyond the confines of the existing litigation to develop public relations strategies and build scalable litigation infrastructures that will serve the needs of future cases. The institutional knowledge acquired through the ECA will not only serve the needs of the immediate litigation, but will also serve as a roadmap to improving the company's litigation results, reducing litigation costs, and strengthening the company's overall business practices. 