Industry Insight

STRATEGY

The Case for Early Assessment

BY ASHLEY WATSON

In a well-publicized case in the 1990's, a Fortune 100 company was blind-sided in a sexual harassment case when internal company e-mails discussing ''25 reasons why beer is better than women'' were introduced into evidence. The company was forced to pay a multimillion dollar settlement to the plaintiff. While we would like to think that companies and employees are currently more aware of how e-mail can come back to haunt them, especially e-mails on such scholarly topics as the superiority of beer over women, the truth is that e-mail comprises the majority of evidence used in business litigation, whether in the context of stock backdating, corporate boardroom leaks, or antitrust cases.

Today's examples may not be as ridiculous or extreme as beer versus women messages, but they can still act as the smoking guns in a legal matter. However, smart companies are beginning to adopt early case assessments, utilizing both technology and processes to enable counsel to make knowledgeable, strategic decisions about what constitutes a good result for the company, including practical dispositive motions or settlement.

But winning the undying gratitude of the public relations department isn't the only reason for corporations to adopt their own early case assessment systems. This article looks at some of the additional benefits and then discusses the key processes, technology, and time frame for an effective litigation evaluation formula.

Benefits

Cost Reduction. Litigation is the perfect example of the old ''time is money'' adage. Without making any comment on a law firm's billing model, the simple truth is that the longer a matter remains active, the more hours a law firm can bill.

Ashley Watson, general counsel and vice president of Attenex, is a recognized industry expert and speaker on corporate e-discovery deployments. Ashley joined Attenex after six years as senior litigation counsel in BellSouth's Complex Litigation Group, where she served as lead counsel on the company's most significant litigation and also developed BellSouth's process for preserving documents and handling electronic discovery.

However, the duration of a case does not necessarily correlate with the likelihood of success. It's quite common, in fact, for corporations to pay out at the end of months or years of litigation the same settlement that could have been attained much earlier. The difference? Besides the aggravation, corporations that evaluate the merits at the outset can save themselves substantial legal fees.

While early resolution will also reduce fees paid to outside counsel, timely appraisal might permit inside counsel to negotiate an alternative fee arrangement with their law firm(s). Such efforts have become more attractive with the rise in billable rates and include flat or fixed amounts, blended rates of junior and senior lawyers, sliding scales, and possible caps. These pacts tend to encourage efficiency and create more of a partnership between the client and its outside counsel, but are best discussed in the planning stages, rather than at the reactionary last minute.

Reducing Risk. Corporations that fully understand what's lurking (or not lurking) in their e-mail are better equipped to manage the potential risk, especially since e-mail tends to be perceived as more reliable than an employee. It's quite common for the legal team to hear an employee's explanation of an issue and believe the case is stronger than what the documents later reveal. An e-mail extolling the virtues of beer over women, if found at the outset of an early case assessment, can help legal teams proactively evaluate the public relations implications of its disclosure.

In addition, by getting an early look at documents, corporations can appropriately gauge the merits of the case and understand its various nuances to ensure that the most relevant data is being preserved and collected. Doing so helps reduce the risk of a spoliation claim, or worse, defeat based on a failure in process rather than the merits. Too often in modern discovery, the principal concern is how lawyers litigate a case, rather than the issues over which they are litigating.

Business Strategy. To protect a company from fighting the process versus substance battle, its executives need thoughtful legal guidance quickly. In today's Sarbanes-Oxley-era of heightened sensitivity to potential corporate wrongdoing, early analysis is critical for developing a plan of action. Business leaders want to correct problems fast, and it is no longer acceptable for the general counsel to advise the board of directors that an investigation is ''ongoing.''

In-house lawyers must adhere to a rigid time frame and offer regular status reports. Generally, they should complete a preliminary report within 60 to 90 days from receipt of notice of a court-based matter. A government investigation could accelerate this process to 30 days or less.

Process and Timing

Preliminary Assessment Teams. That 60-to-90 day schedule makes broad-based support and participation essential components of early evaluation. Supervising teams should include key business division leaders. For example, in an accounting fraud affair, the CFO or controller is likely to be integral to the pretrial activities period and beyond.

That individual (or individuals) will help identify the facts more quickly and sort through them rigorously to find critical details. This enables faster action in terms of case resolution. Also, people who feel invested in the decision-making process provide more help and make better witnesses. They understand and can assist in valuing early settlement versus long-term litigation, and have ownership of the results.

Technology also plays a key role in an early case assessment. Accordingly, corporate counsel should immediately consult with IT experts, internal leaders, and external specialists. They can offer ideas on tools that can greatly accelerate the analysis process. Given the speed at which an assessment team must collect and scrutinize information in various media, as well as the incredible amount of data involved in most business cases today, a uniform technological platform is essential for an effective workflow.

And, of course, outside counsel should provide guidance from the initial notice of the litigation.

Weeks One and Two. *Key Witness Interviews*: begin the process by identifying and interviewing up to 10 key witnesses. Ten is a realistic and manageable figure, particularly given the short time frame. By comparison, it would be challenging to conduct 30 interviews in a few weeks and fully assimilate the responses.

Those initial interviewees will also identify other individuals with knowledge, as well as the key data sources and data maintenance concerns, so 10 is good starting point for a much more complex endeavor.

Preservation: the initial conversations will provide the basis for the data preservation process, which typically requires customization. While a company-wide notice may be necessary in certain instances, it is burdensome and generally unwarranted. Employees also become numb to repeat (and frequently irrelevant) notifications, so they might not have the intended effect anyway.

Begin by contacting key employees and follow up with each personally. After speaking with the first group, distribute a more general notice requesting that individuals with specific types of information contact in-house counsel. Require written responses from those who receive the hold notification, which certify review and assure maintenance of any relevant material. Additionally, it's very important to work with IT to preserve any relevant data in the system and servers.

Those written responses are important and should be part of a consistent protocol during this process. Managing attorneys must retain accurate notes on the preservation procedures and any related decision-making. For ease of reference at a later date, they should be in a format that can easily be converted into an affidavit for the court, identifying the appropriate corporate signatory in advance.

Weeks Three and Four. *Sampling:* once the key personnel have shared their knowledge and documentation, the assessment team should analyze both the data and issues they raise. Effective action requires detailed study of the records, rather than mere reliance on witness interviews. Content analytics programs can quickly identify key documents and categorize significant information to provide useful samples for evaluation.

The sampling process should evolve into a rolling progression in which the reviewers gain insight that prompts subsequent conversations with witnesses and possibly supplemental preservation notifications. At some point within the first month, the legal team can make certain preliminary conclusions about the matter.

Weeks Four, Five, and Six. Based upon those conclusions, and with an understanding of the volume of potential discovery and the story it tells, one can begin developing a defense strategy. An outside vendor can then estimate the costs of managing the information through various stages of the process (e.g., meet and confer, pre-trial motions, trial). Internally, the total costs and risks can be evaluated, including the following broader business factors:

- Potential liability and exposure
- Costs of litigation, including e-discovery vendors, testifying experts, etc.
- Court and venue – different judges and jury pools present varying costs and risks
- Skill and reputation of opposing counsel
- Operational interruption
- CEO and other high-level depositions
- Impact on morale
- Public relations and company brand
- Other business needs such as mergers, product releases, client relations, etc.

Resolution Planning

By combining a thorough analysis of these factors, as well as the items obtained in the preliminary evaluation, the team can develop a series of strategic steps in order to achieve a specified goal, whether through negotiation, motion, settlement, or otherwise. Once a legal team has this goal, it should act as quickly as possible to prepare a simple report for the executive team and others involved that highlights the facts, risks, and a plan of action.

Ultimately, early intervention is vital because the reality of litigation is that the longer cases remain active, the more they cost. And, of course, the more likely it becomes that corporations will be surprised by the silly (if not stupid) things people discuss in e-mail—such as the merits of beer versus women.

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