

Corporate Counsel

Complex Litigation Preparation and Management: Law Firm Trial Lawyers Advise In-House Counsel



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Introduction

Increasingly complex national and international litigation has inundated the dockets of state and federal judges, who along with in-house lawyers for the corporate defendants, have been striving to keep up with the flood. In many ways, complex litigation comes in so many different varieties (multi-jurisdictional, mass action, class action, bet-the-company, international dimensions, etc.) that it defies concise definition. One may even employ Justice Potter Stewart's celebrated yardstick from his concurrence in *Jacobellis v. Ohio*¹ ("I know it when I see it."). State and federal rules define complex litigation in their own ways. For its part, the California Rules of Court offers this definition: "[a] 'complex case' is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel."²

This article is offered from the perspective of defense counsel, experienced in handling complex civil litigation, for the benefit of the in-house corporate counsel charged with building and implementing a litigation strategy, in conjunction with outside counsel, to defend the company against complex claims, filed

in different courts and jurisdictions, by sophisticated, well-heeled, aggressive, and highly coordinated plaintiffs' lawyers. In essence, we hope to help guide in-house counsel as to the tools and philosophies appropriate to reduce the risks and to manage the costs of complex civil litigation. Those dual goals—reduced risks and managed costs—have their own tension and each must be accommodated to achieve both goals. In-house counsel certainly will seek to reduce the company's risks in complex litigation, but will also want to strive for efficiency in partnership with outside counsel to ensure a successful result not just in the current litigation but also in any parallel or future, related litigation.



Credit: David Paul Morris/Bloomberg

In-House Counsel's Basic Checklist After Complex Litigation Commences

Occasionally, amidst the more plain vanilla lawsuits familiar to in-house counsel, a complex lawsuit (or series of lawsuits) is filed that will test the endurance of the company and the skills of the in-house lawyer. In such an instance, as in-house counsel are in the process of retaining outside counsel, there are a series of critical initial tasks to reduce overall risk, preserve integrity

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and privileges, and put the company on the path to defending the litigation effectively, even before addressing the merits of the claims:

- *Circulate and enforce a litigation hold notice.* A litigation hold (or document preservation) notice advises the receiving employee of the need to preserve certain potential evidence. A company or employee's failure to take reasonably effective steps (discontinuing auto-deletes, etc.) to preserve hard copy and electronic documents can have devastating consequences. Banking giant UBS, which was on the receiving end of several groundbreaking opinions imposing sanctions for failure to preserve electronic evidence, is one of many companies that learned this lesson the hard way.³ Optimally, in-house counsel should circulate the hold notice promptly after receiving notice of a threatened claim or case.
- *Identify key custodians, collect relevant documents and evaluate potential witnesses.* The complaint will provide a rough roadmap as to the location of relevant documents and which company personnel may be involved in defending against the claim. As noted above, identifying, collecting, and preserving documents are vital to a vigorous defense of the lawsuit. This inquiry may also reveal which of the company's custodians and employees will make effective witnesses, including Federal Rule 30(b)(6) deponents and the all-important "good company" witnesses.
- *Assess business relationships likely to be impacted.* Complex litigation impacts more parties than just the plaintiffs and defendants. An early assessment of which third parties may play a role in the dispute is critical. An in-house attorney never wants to be on the receiving end of a phone call from an irate business person demanding to know why an important business partner just received a subpoena without prior notice from the company's outside counsel.
- *Consider reporting obligations.* Complex litigation often is spurred by a product recall or other unforeseen adverse event, and in those instances in-house counsel immediately must assess whether and to what extent the company must make disclosures to its shareholders or regulatory bodies to comply with the law.
- *Get the public relations team involved.* The courtroom of public opinion often is a front in complex litigation and in-house counsel should waste no time bringing the company's external communication gurus into the loop to establish public relations protocols to manage the image side of what often can be an ugly and public fight.
- *Evaluate insurance coverage and indemnity agreements.* It can be hard to explain to company management why money was left on the table by counsel's overlooking of available coverage, either from an insurer or business partner, for all or part of the costs and fees associated

with the complex litigation. Counsel may have to conduct some "legal archeology" and inspect the records of former employees, former counsel, and even former parts of the company to assess coverage options.

Hiring and Working with Complex Litigation Counsel

Perhaps the most significant decision in-house counsel will make is selecting the company's outside counsel. For nearly all complex lawsuits, there is no substitute for engaging litigators with the requisite knowledge, experience, judgment, institutional capacity, and, increasingly, foreign language skills, to defend the company in every forum and on every front. Almost immediately, defense counsel can help in-house counsel:

- to learn about the venue and judge(s) assigned to the case(s),
- to provide insight into the jury pool (if available) in the jurisdiction,
- to evaluate opposing counsel,
- to assess the viability of changing venue or challenging jurisdiction,
- to determine whether the addition of other parties is necessary or advantageous,
- to identify expert needs, if any, and
- to assist in the basic checklist discussed above.

Also important is establishing a communication protocol for working with outside counsel, especially where lawyers in multiple offices are engaged on the case. For example, how often will there be face-to-face meetings? Who among the company's lawyers will be designated as the lead communicator(s)? How and in what form will outside counsel provide periodic reports on the status of litigation? What billing and cost parameters must be observed by outside counsel? Establishing the form and frequency of communication up front is critical to a successful working relationship between in-house and outside counsel.

Thinking Strategically

The contribution of sophisticated outside counsel skilled in complex litigation can be maximized by the early education of outside counsel on the facts of the case, the internal workings of the company, the company's business goals, and the development of a strategic plan. To this end, in-house counsel's immediate to-do list after partnering with outside counsel may include the following.

– You Need a Plan

Consider the preparation of a detailed, written case plan. It not only can facilitate thought and discussion on trial strategy, but also can:

- evaluate the merits of the claims asserted and assess the advisability of filing early dispositive motions, including any “rifle-shot” defenses to the lawsuit that could defeat all or part of the lawsuit,
- flesh out the company’s range of acceptable and unacceptable outcomes,
- discuss risk tolerances and specific risk aversions,
- identify and integrate the company’s business objectives into its litigation strategy,
- establish simple, durable case themes that maximize chances for success,
- put everyone on the same page with respect to all aspects of the case,
- reduce (but never eliminate) surprises, and
- allow for more accurate establishment and tracking of budgets.

A case plan is not a static creature but an evolving roadmap reflecting course corrections in discovery and trial strategy, development of new facts, and other changes that are the normal hallmarks of complex litigation. Thus, case plans must be periodically re-assessed to be useful as a management tool for in-house and outside counsel.

– Consider an Early Risk Analysis

At bottom, trial lawyers do two things they identify risks and they persuade. Consider putting the former skill to good use and commission the creation of an early assessment of risks and outcomes (a/k/a litigation risk analysis). Avoid the bane of in-house counsel whose outside counsel do not discuss the risks until their wobbly knees are headed to trial. The company’s decision to rely on a certain legal argument and/or theme, as well as discerning the wisdom of pursuing early settlement, may be significantly aided by such an analysis. Because such an analysis requires outside counsel to marshal and digest quickly the relevant known facts for the purposes of prediction, one collateral benefit of the analysis is that outside counsel will quickly become steeped in the facts of the case. As part of the analysis, in-house counsel must set a tone and create a working environment that fosters candid assessments of knowable risks, empowers outside counsel to deliver bad news from the outset, and invites “truth to power” discussions.

– Build a Simple, Durable Story

In-house counsel must see to it that their outside counsel start defining case themes and place a bulls eye on a winning strategy early in the process. Distilling an articulable, winning story from a complex maze of facts may be the primary skill of good outside counsel. At the end, the story may appear simple and obvious, but like Steve Jobs’s creations, it is the product of deep thinking and significant analysis.⁴

– Know Who Is Working on the Case; Budgeting

A case plan should include a staffing plan that allows in-house counsel to track the lawyers devoted to the case and to manage fees. Understanding the range of costs is important for any in-house legal department. A good case plan generally should precede a good budget since it provides the foundation for making budgetary decisions. The budget also then “tests” the case and staffing plan. Generally, the case plan should drive the budget, not the other way around.

– The Best Defense is a Good Offense, But . . .

One of the first important collaborations between in-house and outside counsel will be to determine whether and to what extent the company can and should bring counterclaims against the plaintiff. There are tremendous benefits to putting an aggressor back on its heels by counter attacking. But it must be done with care and precision. There is no better way to squander credibility with the judge than to bring a meritless counter-suit for the sake of punching back. But in many instances, delay in bringing claims can result in losing them, so the matter must be addressed early and squarely.

– Prepare the Case for Trial, Not Settlement

Despite the fact that most complex lawsuits are settled before trial, putting the company’s case on a trajectory to force plaintiffs’ counsel to establish their claims at trial often puts corporate defendants in the best position during settlement talks. Preparing only for settlement can be short-sighted and leave the company vulnerable in the event plaintiffs’ lawyers are prepared to go the distance.

Developments and Special Issues in Complex Litigation

As noted above, every complex litigation is unique, and not every variation on the theme can possibly be covered here. However, the following are a few observations based on recent complex cases and industry developments.

– These Are Not Your Father’s Plaintiffs’ Lawyers

The legal world has changed in the three decades since Paul Newman turned in his memorable performance in *The Verdict*, portraying Frank Galvin, a down-on-his-luck, alcoholic plaintiffs’ lawyer working out of a dusty one-room office and going up against a cavalcade of Ivy League attorneys from a white shoe Boston law firm. Today’s plaintiffs’ firms and lawyers are not only well-trained and well-heeled, but are achieving high levels of coordination and cooperation between them. These lawyers and firms have banded together to share strategy, research and

even access to expansive databases of information that arm them better than their predecessors to do battle with corporate defense counsel.

– ‘Investing’ in Complex Litigation

In addition to the growing sophistication and coordination of plaintiffs’ counsel, there is a new phenomenon driving complex litigation: private financiers of high stakes litigation. Putting potentially thorny ethical issues aside, these third parties, often hedge funds or entities funded by large banks, target potentially lucrative lawsuits against deep pocket defendants and provide upfront capital (for lawyers, experts, etc.) in the hope of obtaining a generous cut of the settlement or verdict on the back end. These third party financiers also seek to offset the historic advantage of well-funded companies and represent a paradigm shift in the decades old struggle between corporate defendants and their high-end defense counsel and underfunded plaintiff lawyers. According to estimates published by The New York Times, the bankrolling of litigation in the United States now exceeds one billion dollars a year.⁵

– Responding to the New Realities of Complex Litigation

To face off with today’s plaintiffs’ lawyers in complex litigation, in-house counsel must employ a variety of strategies and balance a complex network of defense attorneys. For example, multiple domestic counsel with unique expertise (e.g., one to handle insurance, another for workers’ compensation) may be needed to address all of the issues raised by the litigation. In addition, in-house counsel may need to retain foreign counsel to represent the company’s interests abroad and to manage foreign litigation or regulatory fall-out. This team approach requires development and adoption of new techniques to keep all counsel (including in-house counsel) on the same page. In these situations, there are truly no local problems. Errant representations made in a filing in Kazakhstan will appear in pleadings filed in New York, newspaper articles in Hong Kong, and in European Union press releases.

Discovery Deliberations Are Different in Complex Litigation

In most plain vanilla lawsuits, deciding which documents to produce and which to withhold does not require significant deliberation. In the world of complex litigation though, discovery and disclosure decisions can have extraordinary repercussions for the company and in-house counsel later in the case or in subsequent cases. Given the broad discovery rules in states and federal courts, and the liberality with which they often are applied, significant thought must be devoted to making discovery decisions with outside counsel. Penalties for wrongfully withholding evidence can range from monetary fines to issue sanctions to, in some extreme cases, annulling of a release clause contained in a settlement agreement. Such was the result for chemical giant DuPont in 1999 when the Ninth Circuit Court of

Appeal found that a claim for fraudulent inducement was not precluded by a five-year old release clause that otherwise covered the fraud claim where DuPont was found to have “systematically concealed ‘smoking gun’ evidence” prior to the parties entering into the settlement agreement.⁶ Admittedly, a court disregarding a settlement agreement because of undisclosed documents is a harsh penalty, but in-house counsel must be aware of all of the possible adverse outcomes when staking out discovery positions. After all, the most important interest at stake during a discovery fight is the company’s credibility before the court, and outside counsel generally will advise their clients to err on the side of preserving credibility. Moreover, aggressive discovery positions that are rejected by the court also may impair the company’s ability to mount a particular defense or to assert a variety of privileges and may have a reputational impact in the business and legal community.

Conclusion

The ultimate goal of effective and efficient management of complex litigation by in-house and outside counsel is to put the company on a trajectory to win at trial, or to leverage that path to obtain a favorable settlement. Where a company is confronted with scores of complex suits filed around the country relating to the same issue or occurrence (product recalls, etc.), outside counsel may choose to push certain test cases to trial as a way to obtain early victories, thereby dissuading plaintiffs’ lawyers from investing in similar future trials. In the case of Yamaha, the maker of the Rhino off road vehicle that is the subject of scores of product liability lawsuits around the country, the company pressed nine lawsuits to verdict. As of today, Yamaha prevailed in eight of the nine and on appeal is likely to prevail on the ninth.⁷ Public records show that, as a consequence, the number of new cases filed against Yamaha has gone from a flood to a trickle. The results of such “bellwether” cases also help to establish the parameters of future settlements or provide estimations of likely future outcomes. Plaintiffs’ lawyers may be far more hesitant to press towards trial in one case where the same company has won consecutive victories in similar matters. Of course, not all cases or series of cases turn out so well, but by taking a holistic approach to complex litigation where in-house counsel develops and executes a sound, multi-layered defense strategy as discussed above, the company’s chances of achieving a successful outcome increase exponentially.

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The views expressed herein are those of the authors and do not necessarily represent the views of Bloomberg LP, Jones Day or its clients.

¹ *Jacobellis v. Ohio*, [378 U.S. 184](#), 197 (1964) (Stewart, J., concurring).

² Cal. R. Ct. 3.400(a).

³ See, e.g., *Zubulake v. UBS Warburg LLC*, [229 F.R.D. 422](#) (S.D.N.Y. 2004). Note: this article does not purport to cover the complicated world of electronic discovery and the obligations mandated by the recent amendments to the Federal Rules of Civil Procedure and resulting case law developments, which can merit a treatise unto itself.

⁴ John Markoff, *STEVEN P. JOBS, 1955-2011; Redefined the Digital Age As the Visionary of Apple*, N.Y. Times, Oct. 6, 2011 at A1 ("Mr. Jobs's genius lay in his ability to simplify complex, highly engineered products, 'to strip away the excess layers of business, design and innovation until only the simple, elegant reality remained.'").

⁵ Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. Times, Nov. 15, 2010 at A1.

⁶ *Fuku-Bonsai, Inc. v. E.I. Dupont de Nemours & Co.*, [187 F.3d 1031](#), 1033 (9th Cir. 1999).

⁷ Melanie Trottman, *Yamaha's Legal Engine Has Kept Its Rhino Off-Road Vehicle Going*, Wall St. J., April 25, 2011.