



Case Assessment and Evaluation

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A step-by-step guide to calculating the costs of anticipated or ongoing litigation or preparing a comprehensive litigation budget. This Practice Note examines the factors defense counsel should consider to estimate costs that are beyond the more readily quantifiable elements of a case.

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Corporate law departments are under pressure to minimize their overall litigation spend and exposure. However, it is nearly impossible to predict when a lawsuit may arise, how long litigation may last or how costly it may be. This inevitable uncertainty is due in part to the complex and unpredictable nature of litigation, the many variables involved and the inability to measure certain risks. The best counsel can do is use early case assessment and value-proposition tools to develop informed estimates of the ultimate cost of a lawsuit that is litigated rather than settled.

It may be easier and less costly, at least in the short term, to approach litigation more reactively, such as by investigating and researching issues only when absolutely necessary and hoping cases settle in the meantime. However, an aggressive and thorough case assessment conducted in advance may be one of the most important investments a company can make.

Effective case assessment begins by working backward from the client's goal. To do this, counsel should approach litigation and other legal proceedings as occasions that present potential outcomes and then use qualitative and quantitative assessments to:

- Determine risk.
- Reduce expenses.
- Terminate cases as soon as practicable.
- Otherwise reduce or eliminate further exposure to litigation.

This Note explains the appropriate timing for pre-litigation assessment and the steps defense counsel can take to assess and evaluate the costs of a case, including:

- Identifying, collecting and verifying the pertinent facts.
- Determining if the claims and defenses are viable.
- Calibrating the client's risk tolerance.
- Considering the issues surrounding electronically stored information (ESI).
- Identifying key witnesses and documents.

- Knowing the adversary.
- Developing a game plan.
- Creating a litigation budget.
- Conducting a mock trial and survey.
- Charting potential outcomes for each stage of a case.

TIMING OF PRE-LITIGATION ASSESSMENT

Counsel should not wait until a complaint has been served to start assessing and evaluating a case. The process should start once litigation is likely or merely foreseeable. Counsel must tailor each assessment according to the specific facts. In complicated cases and in cases with significant risk exposure, counsel should take certain basic steps within 30 to 60 days of learning of a potential (or actual) lawsuit. The pre-litigation phase may be the best time to dispose of litigation for the least cost and effort.

Several municipalities, states and federal agencies require a claimant to provide notice of a claim 30 days or more before filing a lawsuit against a governmental entity. Likewise, in litigation against private entities, several federal and state statutes impose pre-lawsuit notice requirements on putative plaintiffs (see, for example, *The Consumer Product Safety Act*, 15 U.S.C. § 2073(a) and California law concerning construction defect claims against builders and developers (*Cal. Civ. Code* § 1375)). These notices provide counsel with limited time to assess a case and determine whether it is preferable to seek settlement. They also allow the client to position itself more favorably in anticipation of the plaintiff serving a complaint.

For example, the 30-day notice provision of California's Consumer Legal Remedies Act (CLRA) provides a valuable opportunity to fully gather the facts and understand the law before a claim is even filed (*Cal. Civ. Code* §§ 1750 to 1782). New York City has a similar notice requirement for filing suit against the city and the city's employees, officers and appointees (*N.Y. Gen. Mun. L.* § 50-e), as does the federal government for most torts committed by persons acting on behalf of the US government (*Federal Tort Claims Act*, 28 U.S.C. § 1346(b)).

After a 30-day notice is received, counsel may undertake a prompt investigation and analysis that may result in successfully convincing the plaintiff's attorneys to drop the claim because of a fatal flaw in their legal theory. Sometimes, companies can cure the alleged violation within a reasonable time (for example, by providing notice and a remedy to similarly situated consumers), thereby preventing an action for damages and limiting exposure to attorneys' fees.

IDENTIFY, COLLECT AND VERIFY THE PERTINENT FACTS

Usually, multiple factors drive case assessment, but the facts always play a critical role. Counsel must understand the relevant facts to help the client make an informed decision on whether to settle, mediate, arbitrate or litigate. A thorough understanding of the facts enables counsel to get ahead of the process and present the client with options, rather than consequences. To understand the client's version of each critical assertion or representation, counsel must conduct internal investigations and interviews that are followed by the gathering of all documentary support and testimonial corroboration. Counsel must not simply collect data but verify it. For resources on how to prepare for and conduct an effective internal investigation, see *Conducting Internal Investigations Toolkit* (<http://us.practicallaw.com/2-502-1874>).

DETERMINE IF THE CLAIMS AND DEFENSES ARE VIABLE

Counsel should determine whether the case has any merit and, if so, whether there are any viable defenses. This includes a review of relevant statutory and case law and the applicable verdict form and jury instructions. Counsel should set out for the client and explain in detail:

- All potentially applicable claims.
- All potential counterclaims.
- All defenses (and third-party claims).
- The estimated costs of pursuing the possible claims, counterclaims and defenses.

Counsel often find it helpful to create an early proof matrix that identifies, for each element of every claim or defense:

- The witness who will testify about the claim or defense.
- Documentary or other evidence that counsel will introduce.
- Anticipated evidentiary hurdles or objections and possible responses.

For a model proof matrix, see *Standard Document, Proof Matrix* (<http://us.practicallaw.com/5-522-5426>).

Using this matrix, counsel should prepare a high-level opening statement and closing argument for both sides of the case. Although counsel may recoil from this suggestion at such an early stage, preparing these materials forces counsel to identify themes, witnesses and evidence and helps distinguish between mere assumptions about exposure and reality. To say that a case is defensible and will not engender excessive costs is different than demonstrating it through a detailed analysis.

Counsel should also prepare a timeline of key events. This helps move away from unexamined impressions about what occurred to the verification necessary for an effective case assessment. The timeline should include each side's version of the events and their corresponding details to highlight any discrepancies.

CALIBRATE THE CLIENT'S RISK TOLERANCE

Although counsel often instinctively view the case from a legal standpoint, there may be non-legal business considerations that are more worrisome for clients. These considerations impact case evaluation and strategy.

For example, counsel must be sensitive to a company's position within the business environment. A company that is the subject of a government investigation or in delicate negotiations over a potential merger is likely to be especially risk averse. These considerations inform how counsel analyze a potential lawsuit and may weigh in favor of early settlement, even if under other circumstances the company would be more willing to fight a speculative claim in court.

Counsel also must calibrate how they evaluate and assess a case in line with the client's needs, level of sophistication and risk tolerance, which vary according to:

- Size.
- Location.
- Industry.
- Number of employees.
- Amount of time the client has been in business.

A start-up company may be unaccustomed to litigation. Therefore, counsel must consider that in its assessment by providing a comprehensive explanation of the various stages of litigation and the operative legal standards that control the case. By contrast, for a larger company that is repeatedly in the courtroom, counsel may assume more sophistication and adjust their analysis to consider the company's prior, similar cases as precedent for predicting costs and exposure.

In addition, counsel must consider that corporate cultures differ greatly in terms of their risk tolerance for litigation. Some companies prefer to settle quickly and avoid any adverse press, while others want to defend the company at all costs. Counsel should consider these factors when assessing a case, especially when calculating how long the litigation may last.

Finally, law departments must determine whether the company should spend money to save money, as controlling the expenses of litigation cannot be their sole concern. This type of evaluation measures the return on a company's investment. Law departments must determine:

- Whether the company will avoid more problematic issues if it spends money on investigating and litigating.
- If circumstances will worsen if the company does not terminate the exposure early.



Failing to assess a case properly is as much of a risk as not investing in research and development. This means counsel must identify, monetize and evaluate risk to achieve overall cost savings.

CONSIDER ESI ISSUES

The client should take early steps to identify, preserve, harvest and review all potentially relevant and discoverable electronic and other data. This is likely burdensome and costly, but the risks of making a mistake are incalculable. For an explanation of ways to ensure a company complies with its ESI preservation and production obligations in federal civil litigation, see *Practice Note, Practical Tips for Handling E-Discovery* (<http://us.practicallaw.com/8-500-3688>) and *First Steps for Identifying and Preserving Electronic Information Checklist* (<http://us.practicallaw.com/0-501-1791>).

Identifying Data

To identify potentially responsive or relevant documents and ESI, counsel should review the information that triggered the duty to preserve the relevant data, such as:

- The complaint.
- The summons.
- The subpoena.
- Other available documents.

Based on the scope of that information, counsel can create a plan to identify the key employees and other potential custodians of relevant data. This includes any entities or individuals that are under the client's control. Counsel may consider retaining an outside expert to help develop and execute this plan. For more information on identifying data, see *Practice Note, E-Discovery in the US: Overview: Where is ESI Located?* (<http://us.practicallaw.com/1-503-3009>).

Preserving Data

To adequately preserve relevant data and avoid sanctions for spoliation of evidence, the client must issue a written legal hold to any employees who may have potentially relevant material. This usually requires suspending routine data disposal policies and contacting former employees and third parties under the client's control. For more information on preserving data, see *Practice Note, Implementing a Litigation Hold* (<http://us.practicallaw.com/8-502-9481>) and *Standard Document, Document Preservation Notice* (<http://us.practicallaw.com/0-501-1545>).

Harvesting Data

In large or complicated cases, harvesting all of the potentially relevant data usually requires third-party document management software capable of tracking and organizing massive volumes of searchable electronic files. This phase of discovery commonly entails expenses related to storing and securing these files and hard copy records, which the legal team reviews for responsiveness, privilege and other factors.

Reviewing Data

The extensive document review necessary to sort through the typical amount of ESI is often the most expensive part of e-discovery. Designing and executing a careful and systematic review is essential to ensuring that the client does not disclose trade secrets or other commercially sensitive data, or waive the attorney-client privilege or work product protection by inadvertently producing privileged or protected documents to the requesting party. For more information on reviewing data, see *Practice Note, E-Discovery in the US: Overview: Reviewing ESI* (<http://us.practicallaw.com/1-503-3009>).

IDENTIFY KEY WITNESSES AND DOCUMENTS

Counsel should identify the key witnesses and documents, and consider which categories of documents (both those that favor and disfavor the client) actually require review. This enables counsel to determine:

- Who will do the review, including whether subject-matter expertise is required.
- Whether expert consultants will be necessary.
- How many of the witnesses and documents may ultimately drive the case.
- The staffing needs and the ultimate costs of document review.
- What document review tools to use.

KNOW THE ADVERSARY

When assessing the potential costs of any claim, counsel should obtain all relevant information about:

- The court.
- Opposing counsel.
- Opposing parties.
- The prospective jury pool.

Much of this information is publicly available and counsel should rely on the experiences of other practitioners in the relevant community. When researching opposing counsel, the inquiry should focus on:

- **Litigation history.** This includes prior litigation results and experience.
- **Reputation.** This includes the tendency to settle early.
- **Financial stability.** This includes the tendency to partner with other counsel to fund or try a case.

Using all of this information, counsel can identify the risk tolerance, goals and primary concerns of all those affected by the litigation, including the company and its insurers, partners and internal business clients. By analyzing these factors and setting out their competing priorities, counsel can evaluate a case comprehensively to position it for favorable and cost-effective termination.

DEVELOP A GAME PLAN

After conducting a preliminary assessment of the facts and the law, counsel should create a framework to help the client determine the best options for each stage of the case's life cycle. This exercise involves continually asking if there is a different concern and a new angle that must be addressed, similar to issue-spotting in law school examinations. Counsel must first identify the various constituencies, desired outcomes and combinations to develop a comprehensive game plan that achieves the greatest number of objectives with the least amount of harm. This is necessary for counsel to adequately assess the probability of achieving the desired outcome and the client's willingness and ability to embrace alternatives.

Issue Spotting

To ensure the game plan addresses all of the relevant issues, when a claim arises, counsel must determine whether:

- There is exposure to punitive damages or the possibility of statutory penalties (such as treble damages).
- There is an applicable statutory cap on non-economic damages.
- There is a potential for copycat plaintiffs.
- The opposing side has knowledge that the client would prefer to keep private.
- There are insurance issues.
- The client's reputation may be harmed or its underlying business model attacked.

Counsel should use the answers to these questions to adjust their analysis of the case's potential costs based on the number of variables and the actual risk exposure.

Once counsel set out all of the relevant issues, they can develop a game plan by working through issues such as:

- What type of case is it (for example, breach of contract, product liability, securities fraud or wage and hour, among others).
- If this case can be settled or if it is a direct attack on the client's business model.
- If litigating (or settling) this case could lead to additional lawsuits.
- If there is any related or potentially related litigation.
- If the dispute may be best addressed by having a structured discussion between each party's high-level executives to work out a business solution to end the litigation (for example, a licensing agreement or a revised contract term).
- If there are ethical issues involved, such as communicating with a party who is represented by counsel (for example, an employee) or reaching out to those in a putative class.

By resolving these issues, counsel may be able to eliminate certain legal procedures from the tasks that are necessary to advance the client's goals while staying within its budget, such as bringing an early dispositive motion or taking pre-certification discovery from the putative class. Counsel can also then advise the client on what steps to take to reduce the likelihood of additional similar claims.

Early Settlement Considerations

Depending on the claims, counsel and the client should also consider the potential for early settlement by considering:

- What mediation or arbitration would cost at this point.
- Whether either mediation or arbitration is an effective use of funds given what is known about the facts, law and opposing counsel.
- What employing separate settlement counsel (specialized counsel hired to conduct settlement negotiations, separate from any litigation counsel being retained) would cost and whether it would be worth the cost.
- For a class action case, if there is a potential for pre-certification settlement at the outset and, if so, what terms the client would be willing to accept.
- What the end results of similar, previously filed cases were (for example, in securities and product liability actions).

Counsel should also consider the various internal and external pressures and constraints that impact a company facing litigation. For example, in a high-publicity case, shareholders (especially institutional shareholders) may aggressively try to persuade the company to settle early. Counsel should determine how to address these internal and external factors to sharpen and clarify their insight into the case and develop a closer, more deeply informed partnership with the client.

Furthermore, when considering settlement, counsel's case assessment must account for the non-litigation costs of losing at trial, including:

- Reputational harm.
- Damage to business relationships.
- Continued business interruption and downtime.
- Collateral consequences, such as:
 - debarment;
 - the potential for parallel criminal or administrative proceedings; and
 - shareholder derivative actions.

For more information on the principal factors that can help counsel and client decide whether, when and how to settle litigation proceedings, see *Practice Note, Settlement Tactics in US Litigation* (<http://us.practicallaw.com/4-502-7417>).



Selecting Outside Counsel

Law departments, working with their retained counsel, must assess whether to retain additional outside counsel to work on the case. For a routine case, they may prefer to partner with one of the law firms with which they usually work to maximize the efficiencies and costs savings associated with retaining attorneys already familiar with their business model, expectations and specific circumstances. Part of this assessment involves law departments determining whether this is the type of case the client cannot afford to lose. If it is, they should consider whether they need to look beyond their usual list of law firms to find the best fit for that particular case in terms of:

- Knowledge.
- Experience.
- Reputation.
- Relationship with opposing counsel and the court.

Insurance and Funding

The assessment plan should consider whether the opposing party has litigation insurance or is funded by a third party (see *Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage* (<http://us.practicallaw.com/8-502-7415>) and *Practice Note, Third-Party Litigation Financing in the US* (<http://us.practicallaw.com/5-518-1314>)). Likewise, counsel should ask whether the client can take advantage of any insurance policies.

CREATE A BUDGET

Line-item budgets are an integral part of any case assessment. Even the best strategy and analysis are merely academic if the costs of implementation are prohibitive or the client is unwilling to incur all the necessary expenses. In addition, budgeting helps inform the litigation plan. Budgets usually are useful tools in assessing whether to continue litigating after reaching various litigation stages during the life cycle of a case. Practical, realistic budgets list variable and fixed costs and establish how frequently counsel is to update the client when costs change and new expenses arise.

Practical and realistic budgets should be developed for each of the following stages of litigation:

- Pre-filing.
- Pleadings (including initial background investigations, challenges and removal, as well as motions to dismiss and motions to compel arbitration).
- Fact discovery.
- Expert discovery.
- Class certification (if applicable).
- Summary judgment and adjudication.
- Pre-trial conference.
- Trial.
- Post-trial motions.
- Appeals.

Certain considerations drive the litigation budget from the outset. For example, counsel should determine:

- Whether there are grounds for a motion to dismiss.
- If there are grounds for a motion to dismiss, whether it is likely that the plaintiff will be able to re-plead to state a viable claim.
- How many attorney hours it would cost to research, prepare and argue a motion to dismiss or to answer the complaint.
- How many witnesses must be deposed.
- How much preparing one or more motions for summary judgment will cost.
- Approximately how many documents will need to be collected, reviewed and produced in the course of the litigation.
- Whether there may be a significant struggle among the parties regarding class certification, removal, transfer of venue or other issues.

These considerations also provide a snapshot of the projected litigation costs, allowing counsel to prepare a rough estimate of what the client can expect to incur if settlement is not reached at each stage.

In addition, the budget must take into account non-attorney expenses at each stage of the case. When evaluating non-attorney expenses, counsel should determine:

- Whether one or more experts are necessary to establish the client's case or rebut the opposition.
- How extensive the expert analysis must be.
- What the costs of outside litigation support vendors, ESI specialists, actuaries, jury consultants, mediators and settlement administrators are.

CONDUCT A MOCK TRIAL AND SURVEY

Both law departments and outside counsel may become biased not only in how they view the facts and the law but also in their reactions to themes and other aspects of the case. Accordingly, a disinterested third party's perspective can be invaluable for initial case assessment. Mock trials are an efficient way to:

- Obtain an outsider's point of view.
- Realistically gauge whether the case is ready for trial.
- Evaluate the reaction of potential jurors.
- Assess damages.

Mock trials are usually handled by jury consultants and followed by a survey of the jurors to understand which themes and witnesses they found most credible. Although mock trials and surveys can be the most effective ways to gain a third-party perspective, counsel usually delay conducting them until a late stage in the case and often wait until the eve of trial. This sort of timing is unfortunate because mock trials inevitably identify gaps in the case and new ways of thinking about the case.

In appropriate cases, mock trials or surveys can and should be done within the first 90 days of the case, following the early identification of key witnesses and documents. Early use of mock trials or surveys can present an unparalleled opportunity to learn how prospective jurors may react to key themes, witnesses and evidence. This is because when evaluating the risks and costs of moving the case forward, counsel benefit most when they can view the case through the eyes of prospective jurors. Furthermore, counsel can integrate the results of the mock trial into a discovery plan that identifies:

- The admissions needed from the opposing parties' witnesses.
- The sensitive or potentially confusing areas that may require more detailed explanations and extensive witness preparation.

Some jury consultants may be willing to scale down a testing exercise to the client's budget. Therefore, instead of making a large monetary commitment to an exercise that the client may view as premature, counsel can limit the scope and purpose of the assessment to gauging reactions to best and worst case scenarios. This can provide invaluable insights and drive how counsel moves forward with discovery, motion and settlement plans.

Another tactic counsel can use during mock trials is to "audition" more junior members of the legal team for key roles to prepare them for trial if the case progresses that far.

CHART POTENTIAL OUTCOMES FOR EACH STAGE

At each stage of the case, from pre-filing through trials and appeals, counsel should assess the costs and likelihood of favorable termination and compare them with the costs and risks of continuing the litigation. This exercise enables the client to make informed decisions at each stage of a case's life cycle, including the:

- Pre-filing stage (see *Pre-filing Stage*).
- Pleadings stage (see *Pleadings Stage*).
- Class certification stage (see *Class Certification Stage*).
- Discovery stage (see *Discovery Stage*).
- Summary judgment stage (see *Summary Judgment Stage*).
- Pre-trial conference stage (see *Pre-trial Conference Stage*).
- Trial stage (see *Trial Stage*).
- Post-trial and appellate stages (see *Post-trial and Appellate Stages*).

Pre-filing Stage

The pre-filing stage provides only a limited window for resolving a case. Unless there is a fundamental flaw in the facts or legal theory, plaintiff's counsel may be unwilling to go away without a payoff. However, with appropriate preparation such as early interviews of certain witnesses or a targeted review of key documents, or both, counsel can identify which cases to push for early resolution and which are worth litigating.

Pleadings Stage

After the complaint is filed with the court, several potential outcomes become possible. The most common outcome is a motion to dismiss the complaint entirely, ending the case and therefore the costs (see *Practice Note, Motion to Dismiss: Overview* (<http://us.practicallaw.com/8-523-9648>)).

Unless the plaintiff's legal theory is fundamentally flawed, however, there may be only a small chance of success on a motion to dismiss because courts must accept the plaintiff's facts as true and draw all reasonable inferences in the plaintiff's favor. Filing a motion to dismiss carries the risk of educating the other side about deficiencies in the case. Even if a motion to dismiss is successful, it is often granted without prejudice, giving the plaintiff a chance to re-plead and correct any pleading deficiencies. Therefore, after assessing the return on investment, clients may seriously consider foregoing a motion to dismiss entirely. For an explanation of pre-trial motions, including motions to dismiss, see *Practice Note, Product Liability Litigation: Pre-trial Motions* (<http://us.practicallaw.com/5-522-5209>).

However, at least in the federal courts, the plausibility requirement at the pleadings stage helps level the playing field by helping the judge view the case realistically. To survive a motion to dismiss, a complaint must plead factual content (not merely conclusions) that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). One of the bases for this refined pleading standard is the concern that "a plaintiff with a largely groundless claim [may] be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). This heightened federal pleading standard may change the calculus for case assessment. There may be a greater opportunity to terminate cases early on, which would make motions to dismiss a potentially better investment for clients.

There are many other possible challenges at the pleadings stage. Motions to compel arbitration are filed more frequently since the US Supreme Court ruled that the Federal Arbitration Act preempted California's rule precluding class arbitration waivers in consumer contracts (*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)). Similarly, motions to remove to federal court or to transfer venue can bring a case to a more defense-friendly forum (see *Practice Note, How to Remove a Case to Federal Court* (<http://us.practicallaw.com/1-506-8452>)).

In addition, motions to strike particular causes of action, or prayers for relief (such as a request for punitive damages) may help narrow exposure. Counsel should evaluate all of these tools at the outset, aiming to increase the client's leverage and create opportunities for early settlement.

Class Certification Stage

In class action cases, if the complaint survives a pleadings challenge, class certification is the next major phase (see *Practice Note, Product Liability: Pre-trial Motions: Class Certification* (<http://us.practicallaw.com/5-522-5209>)). The threat of certification, and its accompanying increased likelihood of high litigation costs, may give plaintiffs great leverage in early settlement talks.

However, the US Supreme Court shifted the balance when it unanimously reversed the US Court of Appeals for the Ninth Circuit and held that the largest employment class action to date could not proceed (*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). In its ruling, the Supreme Court rejected the “Trial by Formula” plan approved by the Ninth Circuit, which would have allowed the district court to try a sample set of selected cases and then apply the percentage of claims found to be valid and the average award to determine recovery for the entire class. In the wake of the *Dukes* decision, lower courts have scrutinized cases more rigorously at the class certification stage and, in the process, have removed some of the leverage that plaintiffs traditionally enjoyed. For more information on class certification, see *Article, How Defendants Can Use Class Certification to Their Advantage* (<http://us.practicallaw.com/6-504-4963>).

Discovery Stage

The discovery stage frequently follows the class certification stage (or the two phases may run concurrently). Discovery is often the most costly, time-consuming and intrusive stage of litigation. This stage always presents many battles and opportunities for both sides, as well as enormous possibilities for budget-breaking cost overruns. Beyond attorney hours and vendor costs, discovery also risks reputational harm if the client must reveal unfavorable documents. The discovery stage diverts resources in terms of the time and productivity of:

- In-house and outside counsel.
- Board members.
- Executives.
- Other employees.

It is often difficult to put an accurate price on the amount of employee time redirected to ensuring compliance with litigation holds and responding to production requests, in addition to preparing for and attending depositions.

Early in the case, courts expect the parties to meet to discuss discovery (*Fed. R. Civ. P. 26(f)*). Also known as a meet-and-confer, the discovery conference is held so that the parties may discuss:

- The nature and basis of the parties’ claims and defenses.
- The possibility of settling or resolving the case.
- Discovery issues, including the preservation of discoverable information and a discovery plan.

Preparing for and conducting this meeting adds to the overall costs incurred during the discovery stage.

For more information on discovery, see *Practice Note, Practical Tips for Handling E-Discovery: Discovery Conferences* (<http://us.practicallaw.com/8-500-3688#a310942>).

To best estimate costs during the discovery stage, counsel should obtain as complete a picture as possible of the opposing side’s:

- Capabilities.
- Cost constraints.
- Number of custodians and other sources of potentially relevant documents.
- Scope of litigation hold.
- Volume of discovery.

Counsel should consider an informal document exchange with the other side to:

- Better estimate what the actual production and review costs will be.
- Obtain the opposing side’s reaction to the client’s discovery (volume and quality of data).
- More intelligently decide whether parties should settle.

The document exchange can be conducted with due sensitivity to privilege concerns (see *Standard Clause, Privilege Waiver Clause with Claw-Back Provision* (<http://us.practicallaw.com/2-501-4958>)). The parties also often agree in advance to a stipulated protective order governing confidential documents, which should be in place before any documents change hands. This informal exchange can sometimes give the client much greater leverage in early settlement talks and provide details to inform an appropriate settlement agreement. For a sample agreement settling a pending lawsuit and releasing future claims, see *Standard Document, Settlement Agreement and Release: A US Example* (<http://us.practicallaw.com/2-503-1929>).

As part of the initial evaluation, counsel should compare electronic discovery (e-discovery) vendors to consider how to use technology and whether outsourcing (or in-sourcing) certain pieces of the discovery or production process (or both) can reduce costs (see *Considerations When Selecting an E-discovery Vendor Checklist* (<http://us.practicallaw.com/4-520-7423>) and *Article, Choosing Outside E-Discovery Service Providers* (<http://us.practicallaw.com/0-506-0531>)).

Counsel must also consider how the client can best prevent processing non-responsive data to minimize the amount of data requiring review and thereby lower costs. Counsel should also weigh the benefits of predictive coding software that can provide a first-pass review of ESI to cull out non-responsive documents (see *Article, Predictive Coding in Action: How It Compares to Human Review* (<http://us.practicallaw.com/4-523-9382>)). Clients appreciate creative efforts and strategies to save on discovery costs.

Counsel frequently hear about disastrous, short-sighted e-discovery strategies resulting in exorbitant costs to a company. For example, a client may be late in issuing a litigation hold and lose key documents, or back-up tapes may have been written over. To avoid these disasters, counsel must evaluate up front:

- What a client's document retention policy requires.
- Whether the client can effectively:
 - issue and execute a litigation hold (see *Practice Note, Implementing a Litigation Hold* (<http://us.practicallaw.com/8-502-9481>));
 - identify relevant custodians; and
 - harvest relevant documents.

Otherwise, discovery may present game-changing costs in addition to potential evidentiary and other sanctions that could sink the entire case. Counsel should take this issue seriously by assuming and preparing for the worst, because opposing counsel may treat ESI as the client's ultimate weakness.

Summary Judgment Stage

After discovery is complete, the case enters the summary judgment or summary adjudication stage. Each side may bring one or more motions attacking the flaws in the other side's case. The summary judgment motion must be based on undisputed facts and each fact must be supported by evidence. Bringing or opposing this motion is usually quite costly because of the tremendous amount of work and attorney hours required to:

- Perform the necessary legal research.
 - Compile the key documents and testimonial evidence.
 - Draft the motions.
- Moreover, the applicable legal standards are designed to allow cases to proceed to trial if there is any doubt about what the evidence would show or how a jury would perceive it.

In addition, judges differ in how they analyze and dispose of summary judgment motions. Consequently, the decisions and idiosyncrasies of the judge in both the current case and his previous matters must factor into any viability assessment on moving for or achieving summary judgment. However, because each side shows its hand by bringing these motions, the period between the filing and the hearing (or the ruling, if there is no argument) can present ample opportunities to settle.

Following the steps above and undertaking a rigorous analysis of the case at the outset allow counsel to make realistic predictions about the viability of each side's potential summary judgment motions. In so doing, counsel can more accurately assess the risks inherent in proceeding to this late stage of the litigation.

For more information on the practical issues that counsel should consider when drafting a summary judgment motion in US federal district court, see:

- *Practice Note, Drafting and Filing a Summary Judgment Motion, Opposition and Reply* (<http://us.practicallaw.com/1-521-9045>).

- *Practice Note, Summary Judgment: Basic Principles* (<http://us.practicallaw.com/8-520-5163>).
- *Summary Judgment Checklist* (<http://us.practicallaw.com/2-522-4471>).

Pre-trial Conference Stage

If the case survives the summary judgment stage, the parties must prepare for the pre-trial conference. However, counsel should treat every case as if it will be tried. Essentially, this means preparing for the pre-trial conference from the start by:

- Identifying key documents and witnesses.
- Reviewing jury instructions and verdict forms.
- Assessing evidentiary issues and motions in limine.

Opposing counsel may not expect this level of forethought so early in the litigation. Well-prepared counsel often overwhelm the other side during initial pre-trial discussions because they send a powerful message that their client is serious about winning the case at all costs. This can result in a favorable settlement. If the case does proceed to trial, the effort that was done up front continues to benefit the client because its counsel is significantly ahead of the opposing side. For detailed information on how to adequately prepare for trial, see *Corporate Counsel Trial Readiness Checklist* (<http://us.practicallaw.com/5-506-5277>) and *Webinar: In-house Counsel's Guide to Trial Prep* (<http://us.practicallaw.com/9-522-2992>).

Trial Stage

All of the steps culminate in the trial itself. Cases are routinely settled on the courthouse steps the night before or even during the trial, as the inherent uncertainty of putting the client's fate in the hands of a jury may be too risky to endure. Nonetheless, an early case assessment must take a realistic look at the costs of trying a case, including:

- Attorneys' fees.
- Expert witness fees.
- Trial support staff fees, including:
 - trial demonstratives;
 - technology; and
 - jury consultants.
- Maintaining a litigation war room.
- Printing and duplicating case documents and exhibits.
- Server and other equipment rentals.
- Accommodations, travel and meals.

These expenses are compounded by the unquantifiable costs of having the client's top executives testify about sensitive issues in open court.

Post-trial and Appellate Stages

The case assessment also must address the client's risk of losing on the merits at trial and its exposure to damages and costs that include:

- Compensatory damages.
- Punitive damages.
- Statutory damages.
- Attorneys' fees.
- Offers of judgment.

Finally, the case assessment should account for the costs of post-trial motions and appeals, which can drag on for years. The client may be left in limbo, unable to move forward with company goals while stuck in litigation and with bond issues. In addition, the client may need to retain separate appellate counsel. Additional expenses associated with motion practice during the appeal itself may arise.

The post-trial and appellate stages should not be forgotten in an early case evaluation. Instead, counsel should carefully consider at the outset how to best present the client with a realistic assessment of the various options throughout a case's life cycle, including these final stages.

For a flowchart of the stages of litigation that counsel can use as a worksheet to help estimate the costs a client may incur at each stage, see *Case Assessment Decision Tree and Costs Worksheet* (<http://us.practicallaw.com/8-525-7430>).

For the links to the documents referenced in this note, please visit our online version at <http://us.practicallaw.com/4-525-8907>

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