Creating the Right Plan for Litigation Management

"In preparing for battle, I have always found that plans are useless, but planning is indispensable." (Dwight Eisenhower)

Introduction

Litigation is, by nature, unpredictable. When the competing wills of adversaries clash, nothing goes precisely according to plan. But the process of planning equips us with a depth of understanding that prepares us to set a direction – aligned with the client's litigation objective – and make adjustments on the fly. The best plaintiff firms, the best defense firms, and the best in-house counsel delve into their case planning early and thoroughly, taking a proactive approach and pressing the pace of the case if that is to their advantage. Average litigation firms do not, and that means they end up in a reactive case approach (otherwise known as "roadkill").

Execution of the pragmatic foundations for litigation management depends on planning. Early planning feeds communication and credibility with clients. It fashions a specific case strategy, allows the right pace to be set for the case, and initiates the system processes designed to lead to success in the case.

The planning process does not look the same for every kind of litigation docket. A specialist in litigation management will customize the fundamental components of litigation planning to fit the needs of specific types of litigation. But what follows are descriptions of fundamental components of planning that need to be considered.

Early Case Assessment (ECA)

Emphasizing "early." Early case assessment, if possible, should start before the case is filed. Certainly that's true for plaintiff firms. They're clearly evaluating the case (hopefully doing so thoroughly) before they ever file the lawsuit. But it is also true in many cases for in-house counsel or defense firms when they're on notice of a potential claim. Go ahead and invest the cost to do a good early case assessment at the first stage of the litigation. True, it costs more in the short run, but it puts you in a position to be much more effective in the case. Almost always it will ultimately result in cost savings, and – from the defense side – save

exposure. From the plaintiff side, the investment on the front end typically enhances both case selection and the ultimate value of the case.

Typically, the ECA process spans the first 60 to 120 days after receipt of the case, with the objective to quickly learn at the outset 80% of what you will ever know about the case.[1] The extent or brevity of an ECA and the amount of time required will vary depending on the size of the litigation and culture of the client and law firm, but litigation effectiveness is leveraged by the initial investment in a robust ECA. Despite variations in approach, the rationale is the same: the vital importance of a rapid and thorough case evaluation.

Understanding your client. While some components of the ECA process will differ depending on the nature of the litigation docket, the common denominator in all project management programs is the need to understand your client.[2] An effective ECA process begins with significant client communication, seeking to understand your clients' problems broadly, considering their business concerns, litigation experience, risk aversion, and how they define success.[3] Explore their litigation outcome objectives and what their expectations are. How does your client define a litigation win? While your client may define a win as a judgment in their favor, a "win" can also be a settlement within a certain amount, or simply making the dispute go away. (And this conversation should be revisited after the ECA process is complete, once you have a realistic assessment of the litigation

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[1] See, e.g., Stephen F. Gates, *Ten Essential Elements of an Effective Dispute Resolution Program*, 8 Pepp. Disp. Resol. L.J. 397, 399 (2008); Lisa C. Wood*, Early Case Evaluation (Litigation Efficiency is Not an Oxymoron)*, LITIGATION PRACTICE--NOTES FROM THE FIELD, 23 Antitrust ABA 90 (2009) (defining an ECA program as "a disciplined, proactive case management approach designed to assemble, within 60 days, enough of the facts, law, and other information relevant to a dispute to evaluate the matter, to develop a litigation strategy, and to formulate a settlement plan if appropriate"); Rees Morrison, *Early Case Assessment (ECA) Spelled Out*, LAW DEPARTMENT MANAGEMENT BLOG, Jan. 4, 2006, https://www.lawdepartmentmanagementblog.com/early_case_asse-3/ ("a concerted effort to complete all the major work within the first 90 to 120 days of a lawsuits filing"); John DeGroot, *Easier Said Than Done: Early Case Assessments Part I*, SETTLEMENT PERSPECTIVES BLOG, Oct. 22, 2008, http://settlementperspectives.com/2008/10/easier-said-than-done-early-case-assessments-part-i/ (hereinafter "ECA Part I"); John DeGroote, *The Early Case Assessment Checklist: Early Case Assessments Part II*, SETTLEMENT PERSPECTIVES BLOG, Nov. 24, 2008, http://settlementperspectives.com/2008/10/the-early-case-assessment-checklist-early-case-assessments-part-ii/ (hereinafter "ECA Part II") (offering "The Early Case Assessment Checklist" which outlines 15 tasks that should be completed within the first 60 days).

[2]*Effective Litigation Management: How to Control Litigation Outcomes and Costs*, FIND LAW, June 20, 2016, https://technology.findlaw.com/legal-software/effective-case-management-how-to-control-litigation-outcomes-and.html

[3]Michael T. Colatrella, Jr., *A Lawyer for All Seasons: The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93, 130 (2012).

exposure in the case, because your client's level of risk aversion may change the definition of success.)

You should know your client's preferred communication style and how often they wish to be updated. Does your client want to be included on every communication or only significant matters? Does the client prefer emails, phone calls, or texts? When representing a company, you must "partner with in-house counsel"[4] to learn the corporate culture and dynamics, especially relating to litigation risk and budgeting, and to understand hierarchies within the company, reporting relationships, and how in-house counsel is motivated and evaluated.

Creating the checklist. Different ECA processes contain different checklists, but there are commonalities. We offer five primary categories of checklist considerations here, followed by potential components below for you to consider in each category:

- ☐ The Facts
- ☐ The Law
- ☐ The Forum and Your Opposition
- ☐ The Damage Model and Exposure
- ☐ The Plan

In working through the ECA process, it is important for everyone to understand that true planning requires an objective evaluation; you are not just planning your own side of the case and your own arguments.[5]

Although these potential components are drawn from multiple sources and from experience, most of the following recommendations are discussed by John DeGroote in a six-part series on his blog, SettlementPerspectives.com, published as "The Early Case Assessment Checklist" and outlining his recommendation of 15 tasks that should be completed within the first 60 days.[6]

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[4]James M. Truss, *Litigation Management: Results-Oriented Leadership*, (Feb. 15, 2017), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2017/winter2017-0217-litigation-management-results-oriented-leadership/.

[5] John DeGroote, *Putting the Checklist into Action: Early Case Assessments Part III*, SETTLEMENT PERSPECTIVES BLOG, Oct. 28, 2008, http://settlementperspectives.com/2008/10/putting-the-checklist-into-action-early-case-assessments-part-iii/.

[6] This blog series was turned into a Texas State Bar CLE article, see John DeGroote, Robert M. Manley, & Frank C. Vecella, "Effective Litigation Management: Doing a Good Job at 'Herding Cats'" (August 2-3, 2012), *State Bar of*

The Facts.

- **A Claims Summary:** An executive summary of the plaintiff's claims and the defendant's response.

- **The Other Side's Position:** The complaint, demand letter, response, or whatever you may have containing the other side's position and perspective unfiltered and in their own words. (You need to put yourself in the shoes of your opponent. Think like they think, understand where they're coming from, or your analysis is very one-sided, incomplete and vulnerable.)

- **A Timeline:** A timeline of the facts to date, showing the relevant facts and key dates, linked to supporting documents. (There are multiple applications that are highly useful for building timelines from facts and documents, such as CaseMap by Lexis.)

- **The Documents:** The 10 best documents (or facts) for ***each*** side of the case (i.e. including the worst documents for your side of the case). There is nothing magic about the number 10, other than forcing you to identify, focus on and articulate key strengths and weaknesses, the ones that are most likely to be pivotal in the case.

- **Interview Summaries:** Summaries and witness evaluations of all key interviews (especially including interviews of unfriendly witnesses).

- **Other Key Witnesses:** At the outset of the case you may not be able to talk to all of the key witnesses, or you may not even know the actual identity yet of key witnesses, but you often know the categories of the likely key witnesses out there, so identify them by description.

- **Your Experts:** A summary of expert testimony required or desired and likely candidates to serve as consulting and testifying experts.

- **The Themes:** A concise statement of each side's likely themes, i.e. the essence of the opening statements and closing arguments that you're going to make and that you anticipate your opponent is going to make. As acknowledged by DeGroot and others, out of all the recommendations here this may be the

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Texas, 11th Annual Advanced In-House Counsel Course, https://www.mckoolsmith.com/media/article/98_Effective%20Litigation%20Management%20-%208-3-12.pdf).

hardest to implement because there is a psychological reluctance to do it at the beginning of the case, and yet it can be incredibly revealing. Jury testing (discussed below), when done well, leads you to articulate these themes and these basic arguments that are being put forth not only by yourself but also by your opponent. From experience, this is highly beneficial because it is forcing you to see the case through your opponent's eyes as well as your own, and that is illuminating.

The Law.

- **The Jury Charge:** A draft jury charge provides an understanding of what issues will be submitted to the jury. Without that, it is very difficult to develop the right plan for presenting or defending against those issues.

- **A Summary of Legal Issues:** A summary of additional legal issues, especially those with the potential to be dispositive of some part or all of the case without a jury determination, and the likelihood of success of the related legal motions (such as motions for summary judgment).

The Forum and the Opposition.

- **A Venue Analysis:** A memo evaluating the court, the jury pool, past verdicts in similar cases, and the applicable appellate court's rulings on similar issues.

- **The Opposition:** A memo analyzing opposing counsel, the legal team, the trial experience of opposing counsel and the opposing party, the extent of experience between the opposition and the court, and any cases of note.

The Damage Model and Exposure.

- **A Damages Case Skeleton.** An outline of the different damage elements, the standards, and the proof.

- **Economic Damages Assessment.** An assessment and quantification of the potential economic (tangible) damages in the case.

- **Intangible Damages Assessment.** An assessment and potential range of the possible intangible damages in the case (including any claim for punitive damages).

- **Potential Sources of Payment.** A memo identifying potential sources of payment of a judgment, including insurance, indemnification, shared liability with other parties, and – if liquidity of the party is in question – potential recoverable assets of the party.

- **Exposure Risk Analysis.** This analysis pulls together the facts, the law, the forum and opposition, and the damage model to summarize the likely exposure, including your client's exposure and the potential exposure of the other side. If you're looking at this from the plaintiff's standpoint, what exposure do you have in terms of financing the case (and what is the exposure that the defendant has in defending this case), and what is the potential upside? Additionally, it is often helpful to break down this exposure analysis into stages of the case, including both direct costs of the litigation as well as indirect exposure to your client or the opposition (such as the impact of the litigation on other business).[7]

The Plan.

- **Our Strategy.** An outline of the case strategy (which must be an interactive process with the client). What are your concurrent approaches to the litigation going to be (your discovery and motion strategy, your settlement strategy, your financing strategy if you or your client need that), and how are you going to be checking all of these off, to be sure each is happening and on schedule? This is going to be the essence of your litigation project management plan (discussed below).[8]

- **The Budget:** A realistic budget to take the case to (and through) trial (often broken down by pretrial stages), including relevant assumptions, a case timeline, and any potential for an alternative billing arrangement.

- **A Settlement Plan:** A potential settlement analysis with a plan for the timing of and approach to negotiations.

[7] Robert B. Calihan, John R. Dent, and Marc B. Victor, "The Role of Risk Analysis in Dispute and Litigation Management," *ABA 27th Annual Forum on Franchising*, *2 (2004).
[8] In addition to previously cited sources, see Eric L. Barnum, "Introduction to Early Case Assessment," 17 *Prac. Litig.* 21, 22 (2006).

Decision Tree Analysis (DTA)

Decision tree analysis, or DTA, has been utilized in fields other than litigation for decades – extensively in business school training, in engineering, even in medical schools in the effort to teach a logical, rational approach to life and death decision-making. It's been used extensively in major litigation since at least the 1990s by some in-house and outside counsel. It is also referred to as “litigation risk analysis” (a term trademarked by Marc B. Victor).

DTA is a useful way to graphically illustrate the exposure risk analysis in the ECA process, but its use goes beyond just early case assessment. DTA continues to be an excellent way to update the quantification and illustration of risk as the case progresses through its various stages toward trial.

What's the point of decision tree analysis? Lawyers, and especially trial lawyers, tend to be biased in favor of and overconfident about their cases (at least in their early stages). They also tend to be imprecise in quantifying the upside or the downside of a case, saying things like, "I think we have a good chance of prevailing on that issue," or "I think it's likely we're going to win." Those imprecise terms inhibit true understanding with a client – or with another attorney or a mediator – of the actual case valuation, or of the weighting of contributing factors that go into the case valuation. And if one attorney says a case is worth $900,00 and another attorney says $100,000, how can we drill down to understand the underlying assumptions being made to reach those different numbers? DTA facilitates identifying, communicating and comparing the competing valuation assumptions being applied to various factors in the case.[9]

DTA requires you to identify the most pivotal decisions that a judge or jury will likely make in the case, and then to quantify the probabilities and likely effect of each decision being decided favorably or unfavorably for your side of the case. Think of a decision tree as seeking to mirror the decision processes of a judge and of a jury. What are the major pivotal decisions that the judge will have to make about this case, and then what are the major decisions that a jury will have to make, if the case reaches the jury? For each of those decision points, we are seeking – based on judgment – to assign probabilities and, based on which way

[9] Robert B. Calihan, John R. Dent, and Marc B. Victor, “The Role of Risk Analysis in Dispute and Litigation Management,” *ABA 27th Annual Forum on Franchising*, *2 (2004).

the decision goes, what that means regarding the damage exposure in the case. We ultimately take those various decision points, probabilities and damage ranges and calculate what those mean in terms of total settlement value.

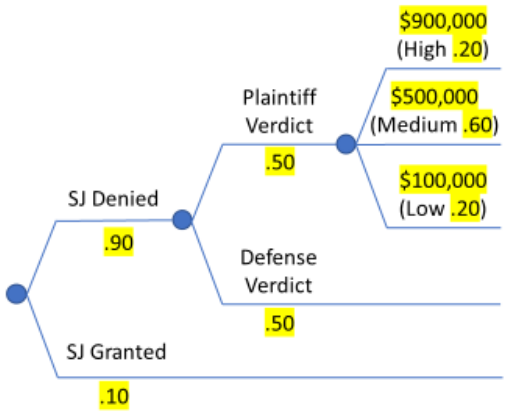
Is DTA scientific? No, it's not, because it’s based on judgment. It does, however, bring a level of rigor to the quantification that's going on by illustrating what underlying assumptions and judgment calls are being made. Often the judgment is that of the attorneys, sometimes it involves client judgment (usually with business clients who have some sophistication in litigation), and today it increasingly involves the use of data analytics drawing statistically from experience in similar cases. DTA simply demonstrates the judgment calls in a way where we understand the underlying assumptions going into the valuation and the decision points for the valuation.

Is DTA predictive? No, for the same reason that it's not scientific, it's not predictive. But it brings your assumptions and those of your team to the surface so they can be recognized and analyzed. And it allows us to combine a variety of decision points, and the probabilities and damage ranges that we're assigning to them, to see what settlement value or case assessment value those assumptions suggest. This is helpful for a client trying to assess the potential timing and dollar amount of a settlement, and it allows a litigation team to make good, rational decisions about the extent of resources to be justifiably poured into pursuing or defending the case.

What are the steps for constructing a decision tree?

Step one. There must be an identification of the pivotal decisions to be made by a judge or jury. What are the key forks in the road we expect to encounter in this case? This process of identifying the pivotal issues upon which the case is likely to turn is valuable in itself, because those pivotal issues suggest the things that need to be emphasized in the case development and litigation project management plan.

Step two. Graphically construct the decision tree, laying it out on a page (sometimes with sub-trees on a separate page).



This column should = 1 (i.e. 100%)

Total this column to get total expected value

Scenario	Compound Probability	Damage Award	Expected Value
1	.09	900,000	81,000
2	.27	500,000	135,000
3	.09	100,000	9,000
4	.45	0	0
5	.10	0	0
	1.000000		225,000

Step three. Once the decision tree has been portrayed graphically so we can see the key decision points (or risks) in this case, go back and assign probabilities. What is the probability of the judge or the jury taking this fork of the road as opposed to that fork of the road on each of these decision points? There is also the assignment of damage ranges. Once you get to a particular outcome, what is the jury likely to do with that? Oftentimes, we are dividing those damage ranges into a high, a low, and something in the middle. You're applying the numbers based on judgment which, once displayed, may become a point of discussion and analysis among the team members.

Step four. Compound the probabilities times the potential damages for each of the various branches of the tree, and then add together the values of all branches of the tree to reach an overall settlement value of the case (based on the assumptions made). Essentially, once you've done steps one, two, and three, step four is automatic, just math, something that a digital DTA program (such as TreePlan that works with Excel) will do for you.

Step five. Consider adjusting the case valuation by some other factors that need to be brought into the analysis. For example, what is the risk tolerance or the risk aversion of your client? That can drive the willingness to spend more up or down. What is the cost of the litigation (both the cost to you or your client, as well as

what you're factoring in for the cost of your opponent)? Is the litigation likely to be injurious to your client's or your opponent's other business operations? These additional considerations can obviously affect the analysis.

Again, this is not a final, scientific determination. It is a way to bring to the surface the underlying assumptions and the underlying judgment that's being applied, but displayed in a way where we can drill down and examine it, not just take an overall assessment of value with no real way to question that assessment.

Litigation Project Management (LPM) Plan

The ECA process should produce an effective litigation project management plan.

Increasingly, sophisticated clients expect law firms handling their litigation to use some form of litigation project management, to increase predictability and hopefully the excellence, effectiveness, and efficiency of the result. Corporate clients are pressing their legal departments as purchasers of legal services to better manage the litigation arena and to reduce total legal spend as a percentage of revenue. This increased internal pressure on legal departments translates into changing expectations being directed to their outside counsel.

The goal of litigation project management is to drive consistency, efficiency, and the effectiveness of efforts into the decisions and judgments of lawyers, in response to a wide variety of sometimes hostile circumstances. Litigation project management is a means by which law firms and clients can assure that the right people are doing the right things at the right time and at the right cost.

As with other aspects of litigation management, LPM plans will be customized differently for different kinds of litigation dockets, but they share some essential aspects.

First, understanding the project. What is it that you are being asked to do as a law firm? And from a client perspective, what is it that you are asking the law firm to do?

Second, communication. Communication is a key element of the LPM arena because everyone needs to be on the same page as to what's viewed as success, what's viewed as the appropriate level and means of ongoing communication, and what's viewed as appropriate tasks.

Third, a plan with a process. LPM involves a work breakdown structure, a plan of action from start to finish (or by phase, e.g. from start to summary judgment, from summary judgment to trial) for the tasks that are needed to produce the successful result. It's broken down into categories and then tasks and sub tasks. In an LPM plan, the work to be completed should be organized in a timeline, broken down by phases, and tasks should be assigned to team members.[10]

Fourth, an evaluation. Ultimately, as part of the LPM process, there is an evaluation of lessons learned. The hope and expectation is that, having done it once, we will have learned something that we can then include in the next round of developing, monitoring, and executing a plan.

Establishing a reporting and tracking procedure is crucial in LPM, but there are many different approaches you can take. Two traditional methods that lend themselves to this process are to assign a project manager or to maintain an updated list as a team. Under the former method, the project manager is responsible for ensuring all tasks are completed on time through regular check-ins with team members. The second approach should be a regularly updated list that clearly states who will do what when, and if possible, it should be continuously accessible to team members online, or updated and published to team members on a regular basis.[11]

LPM – and various approaches to it – are discussed in more depth in "Right Tools: Litigation Project Management (LPM)."[12]

Jury Testing

Jury testing (including focus groups, trial simulations, and online testing) provides valuable planning insight both when conducted early in the case and subsequently in preparation for an approaching trial. Early focus groups help identify problematic issues in the case (immensely beneficial for early case assessment) and gaps in the

[10] Sterling Miller, Ten Things: Legal Project Management for Beginners, (July 31, 2017), https://sterlingmiller2014.wordpress.com/2017/07/31/ten-things-legal-project-management-for-beginners/.
[11] John DeGroote, Robert M. Manley, & Frank C. Vecella, "Effective Litigation Management: Doing a Good Job at 'Herding Cats'" (August 2-3, 2012), *State Bar of Texas, 11th Annual Advanced In-House Counsel Course*, https://www.mckoolsmith.com/media/article/98_Effective%20Litigation%20Management%20-%208-3-12.pdf). (DeGroote et al recommend a list, which they refer to as an "Action Item List.") A number of law firms have developed their own system for litigation project management, such as BakerManage from the Baker Donaldson Firm.
[12] This paper is included in Module 6: The Right Tools in the LL.M. Fundamentals of Litigation Management course.

evidence (to help direct discovery). Later focus groups before trial help clarify themes and trial presentations and help assess potential jury responses to the trial presentations.[13]

Jury testing consists of pretrial work with mock jurors to provide insight into how real jurors are likely to react to your case, and how you can adjust your approach and case presentation to lead to a better result. This testing fills a void that has widened over the last 25-30 years. Lawyers 30 years ago routinely had the opportunity to obtain jury verdicts and post-trial feedback. Today, most lawyers do not have the chance to try multiple cases a year. Jury testing helps fill the void. Additionally, jury testing has an advantage over actual trials: you get to do it again until you get it right. Jury testing allows systematic adjustment and improvement if you know how to do it (and if you can do it cost-effectively). When necessary, being able to test your trial strategy multiple times can drastically change the outcome of a case.

We have found that only a minority of trial attorneys employ jury testing, but that minority largely includes the more successful trial attorneys. The common reasons why other attorneys do not routinely use jury testing include a lack of knowledge regarding its benefits and how to do it effectively, and a failure to recognize how a system can be set up to routinely conduct jury testing at a far lower cost than assumed.

This section will discuss common variations of jury testing: jury testing through focus groups and online resources, and trial simulations through mock trials.

Concept focus groups. A concept focus group is most effective at the outset of a case. It utilizes a moderator with a single focus group at a time[14] (6 to 8 jurors work very well, demographically matched to the anticipated jury venire). It commonly needs only two to four hours, making it inexpensive to conduct. The objective is to present or "unpack" the facts in a completely neutral manner (i.e. where the jurors have no sense of your identification with either side, which is not as easy as it sounds) and to explore both the reactions and questions of jurors to obtain insight into the range of how jurors might actually think about this kind

[13]Jeffrey T. Frederick, Searching for Rocks in the Channel: Pretesting Your Case Before Trial, http://www.nlrg.com/our-services/jury-research-division/our-services/juror-small-group-studies/mock-jury-trials.
[14] https://www.gibsondunn.com/wp-content/uploads/documents/publications/McRaeScolnick-CaseAssessmentandEvaluation.pdf.

of case. This kind of jury testing is too limited to fully assess the likelihood of liability and the range of damages at trial. Instead, the goal at this early stage is to simply understand what issues in the case are most likely to resonate with and trigger reactions and biases of jurors, positively or negatively, and what kinds of factual questions need to be explored in discovery.[15]

Structured focus groups. A structured focus group is typically first used after completion of at least the initial document discovery and depositions of parties, and often close to trial. It routinely includes the use of key exhibits or video excerpts. Instead of the moderator unpacking a single neutral statement of the case, the moderator introduces lawyers who then sequentially present the opposing sides of the case in an abbreviated format. A plaintiff presentation is made first, typically with a specified time limit of less than two hours, taking the form of a combined opening statement and closing argument with the display of a timeline, key evidence, and short video excerpts of key witness testimony. A defendant presentation follows, with a similar time limit and a balanced use of timeline (often focusing on different facts), key evidence for the defense, and competing video excerpts. A brief rebuttal is often allowed for the plaintiff to mimic closing argument at trial. Jurors fill out private verdict forms with their initial reactions prior to the start of jury deliberations, and then they deliberate to a group verdict while the legal team observes the discussions via live video feed.

The objective is not to "win" the focus group, but instead to script and track as closely as possible – in a summary form – the actual themes, arguments and evidence that each side is expected to present at trial, in order to test and learn from the juror reactions. (Because structured focus groups require attorneys to consider what themes and strategies the opposition may use, the preparation itself for the focus group is beneficial.[16]) The value of the jury deliberations goes beyond simply learning the verdict rendered. The discussions themselves provide rich insight into the range of juror reactions to the various themes, issues, exhibits, witnesses, and arguments. To further enhance both the information obtained and the degree of confidence in the consistency of juror reactions, a structured focus group will often entail presentation of the case to a group of 24

[15] https://www.thejuryexpert.com/2013/08/the-why-and-how-of-focus-group-research/
[16] https://www.thejuryexpert.com/2013/08/the-why-and-how-of-focus-group-research/

to 36 jurors who are then divided into three separate juries for simultaneous deliberations.

Mock trials. Mock trials provide a shortened trial presentation to a group of individuals acting as jurors and are most useful after you have gathered facts, established themes for your case, and developed arguments.[17] Although the term "mock trial" is sometimes used interchangeably with "focus group," as used here it refers to a process that enlarges upon a structured focus group. Instead of summarizing each side of the case in a combined opening statement / closing argument lasting an hour or two at most, each side is allocated a somewhat longer time (often up to four hours each in a larger case, with jury deliberations occurring the next day) to present an opening statement, offer exhibits, present video excerpts of direct and cross examinations of key witnesses, and make closing arguments.

When reactions to specific witnesses are expected to be crucial, this extended format permits a greater focus on individual witness testimony, as well as a somewhat deeper immersion into the facts of the case. Perhaps the most important lesson in a trial simulation is its ability to identify gaps in an attorney's argument and evidence, and provide new ways of thinking about the case.[18] Attorneys also have the opportunity to view jury deliberation during mock trials so that they can see which arguments and items of evidence were most meaningful.[19]

The mock trial helps answer a variety of questions:[20]

* What is the relative value of the different facts and evidence, and on which facts do jurors place the most importance?
* What evidence will jurors readily accept at face value, and what is inherently weak?
* What is the relative value of different witnesses or testimony, and how is their credibility determined?

[17] https://www.decisionanalyst.com/whitepapers/mockjuries/
[18] *Id.*
[19] https://www.thejuryexpert.com/2013/08/the-why-and-how-of-focus-group-research/
[20] https://www.thejuryexpert.com/2013/08/the-why-and-how-of-focus-group-research/

* How do jurors weave the evidence with the arguments?

* What phrases resonate with jurors and what language should be avoided?

* What emotions or feelings are influencing the jurors and how will they shape their impressions of the case?

* What types of jurors are most favorable?

Mock trials can help manage client expectations by providing clients a more a realistic view of damages. Ultimately, a mock trial will tell you whether your case is ready to go to trial, or if not, what areas still need more work.

Online jury testing. Online focus groups can provide attorneys with valuable juror information at a lower cost than in-person jury testing.[21] In an online focus group, attorneys can pull jurors from the particular venue, a national pool, or a pool the website considers representative of the particular venue. Juror research can also be conducted through a survey, conducted online, by phone, or through mail.[22] These surveys can offer a wide range of data from specific geographic regions and questions can be structured as yes/no, scaled, or open-ended.[23] Online juror surveys can produce information about the trial venue and decision preferences of jurors by collecting information on opinions and values, potential themes, and perceptions of litigants in the venue.[24] In-depth information on juror opinions, decision preferences, and background characteristics allows you to develop a profile for jurors who are most and least favorable to your client and in forming the important questions to ask during voir dire.[25]

[21] https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2018/new-online-methods-for-jury-research/; for online jury research websites *see* www.onlineverdict.com; https://magnals.com/jury-consulting-2/; https://www.decisionquest.com/services/online-jury-research/.

[22] https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2018/new-online-methods-for-jury-research/

[23] https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2018/new-online-methods-for-jury-research/

[24] http://www.nlrg.com/our-services/jury-research-division/jury-research-publications/using-juror-surveys-in-trial-preparation

[25] http://www.nlrg.com/our-services/jury-research-division/jury-research-publications/using-juror-surveys-in-trial-preparation

Conclusion

Great advantage goes to the litigation team equipped to systematically plan for the litigation management of its cases, with the planning customized to fit the needs of the specific litigation docket being managed.