

**Lemons to Lemonade:  
Capitalizing on the Potential Benefits of Litigation**

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## **Introduction**

Litigation is expensive. In pure dollar cost, corporate counsel report spending a median of \$1.7 million on disputes per \$1 billion of revenue,<sup>1</sup> but there are other costs as well, including employee time lost, business disruption and negative publicity. As a result, litigation budgets are generally viewed as a cost center – a necessary evil with little value-add for the organization. But, with a bit of advanced planning and outside-the-box thinking, it is possible for an organization to experience actual, tangible benefits from litigation-related activities. This article addresses several different ways organizations can realize those benefits and turn the sour lemon of litigation into something palatable and – quite possibly – beneficial for the organization in the long term.

### **Litigation as an Opportunity to Engage in Risk Assessment and Mitigation**

In the process of preparing a defense against a products liability lawsuit or regulatory investigation, litigation attorneys will likely obtain a broad and deep knowledge of the organization they are representing. In fact, the litigation attorneys may possibly have access to a broader range of information than any other individual in the organization. It behooves the organization to learn what issues these attorneys have identified. Correcting those issues before an auditor, whistleblower or plaintiff's attorney has an opportunity to identify them may save the organization untold dollars in the long run.

### ***Filling Gaps in Processes and Procedures***

Many important internal activities of products manufacturers are governed by complex standard operating procedures (SOPs) and policy documents. A thorough analysis by an experienced defense attorney can expose gaps in those processes and procedures, uncovering a breakdown in a procedure, a written process that is not followed in practice or the absence of a necessary policy. The organization should ensure its defense counsel are reporting back those policy or procedure gaps/breakdowns so that the issues can be addressed internally, potentially minimizing liability or negative audit findings, or simply saving the organization money through improved process efficiencies.

### ***Reassessing Contracts***

A lawsuit does not have to be contract-based in order for litigation counsel to learn that the organization has important contracts in need of revision. As counsel collects and reviews contracts for production in response to discovery requests, or reviews contracts for another purpose – such as to identify responsible third parties, they often find contract terms that need to be revised or provisions that need to be added or strengthened in order

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<sup>1</sup> Norton Rose Fulbright US LLP, *2017 Litigation Trends Annual Survey Report* at 1, available at <http://www.nortonrosefulbright.com/files/20171025-2017-litigation-trends-annual-survey-pdf-157870.pdf> (last visited April 6, 2018).

to protect the organization in the future. For example, vendor contracts may need stronger HIPPA compliance provisions or indemnity language.

### ***Strengthening Future Privilege Claims***

Preparing or defending a privilege log provides an excellent opportunity for outside counsel to identify vulnerabilities of an organization's privilege claims and for the organization to take steps to strengthen those claims in the future. For instance, it is not uncommon for litigation counsel to identify employees who are regularly waiving the privilege by forwarding attorney-client communications to third parties. Those employees can be counseled to prevent waivers in the future. It is also fairly common to find in-house counsel regularly mixing his or her legal and business roles, and outside counsel can suggest strategies to protect the privilege of core legal advice provided by in-house counsel.

### ***Identifying “Problem” Employees in Need of Counseling or Termination***

The litigation document review, interview and deposition process often uncovers employees whose transgressions have either been well hidden or simply gone unnoticed by the organization. It is rare that a large products liability litigation does not uncover at least one employee who is not following important policies and procedures, is creating compliance issues or is simply not doing his or her job correctly. Identifying these employees and either counseling or terminating them before the organization is negatively impacted can prevent or minimize future legal issues and expenses.

### **Litigation as an Opportunity to Take Charge of Your Data**

Mass tort litigation and regulatory investigations often require product manufacturers to identify, collect, review and produce massive amounts of data in order to respond to plaintiffs' or the governmental entity's requests. These involuntary exercises, however, provide an excellent opportunity (and impetus) for an organization to implement more effective information governance practices, such as identifying and cataloguing data, ensuring data is properly protected, identifying new uses for underutilized data and possibly reducing the scope of unnecessary data. There is also an opportunity to review, update and modify document retention policies. Improved information governance can add to an organization's bottom line by allowing it to effectively leverage the value of its data, reduce the risk of costly privacy and data security lapses, reduce the cost of complying with discovery in future litigation and reduce storage costs through the elimination of obsolete information.<sup>2</sup>

### ***Identifying or Mapping Data***

An important first step in an effective information governance program is to identify and “map” what data the organization possesses. The process of identifying

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<sup>2</sup> 15 Sedona Conf. J. 134 (2014).

litigation-responsive materials can present be an opportunity for the organization to map what data the entity stores, where it is stored, who stores it and for how long the data is stored. Data maps commonly detail:

- The drives or networks utilized by the organization, and the restriction on, access to and back up of those drives or networks.
- The storage of legacy data and individuals who have access to that data.
- The databases/websites/collaborative platforms utilized and individuals with access to them and knowledge on how to utilize proprietary databases.
- The location of individual data repositories such as individual laptops/home computers/cloud storage/smart phones/flash drives/external hard drives/dvds, who has access to the individual repositories and how that data is backed up.
- The location of papers files, who created the files and who has access to those files.

The benefits to an organization of comprehensive data mapping are numerous. An organization can decrease future discovery costs by allowing it to quickly identify responsive data in future litigations, audits or investigations. Data maps also reduce the risk of future sanctions or penalties by allowing the organization to more readily identify data that must be preserved for various legal reasons. Data maps can also speed up the closing of a divestiture or sale by allowing the selling organization to quickly identify requested due diligence materials.

### ***Identifying Risky Data Practices***

The litigation discovery process also provides an excellent opportunity to identify risky data management practices that could result in future data privacy breaches, trade secret/intellectual property losses or cyberattacks. As counsel identifies and collects data and documents, they sometimes encounter potentially devastating information practices, such as employees downloading files to, or working from, unprotected personal computers, employees downloading data to unencrypted zip drives or unsecure cloud storage or organizations providing network access to vendors without adequate security. Once identified, the organization can take steps to correct those problem practices before they cause greater harm.

The repercussions of improper data protection practices cannot be overstated and grow stronger every year. Just a few examples include:

**GDPR Penalties:** The European General Data Protection Regulation (GDPR) compliance requirements became effective on May 25, 2018, bringing with it stiff fines of up to 4% of an organization's annual global turnover for serious infringements (ex. violating core Privacy by Design concepts) or 2% of global turnover for not notifying a supervising authority and data subject about a breach or not conducting an impact assessment.<sup>3</sup>

**Data Hack Litigation:** Large organizations face expensive class action litigation and/or costly credit monitoring services as a result of data hacks. For example, Anthem, Inc. paid \$115 million to settle litigation over hacking in 2015 that compromised the personal information of about 79 million individuals.<sup>4</sup> Target Corporation disclosed in its 2016 annual report that it had incurred \$202 million in net cumulative expenses related to a 2013 data breach.<sup>5</sup>

**Theft of IP:** The annual cost to the U.S. economy continues to exceed \$225 billion and could be as high as \$600 billion for counterfeit goods, pirated software, and theft of trade secrets.<sup>6</sup>

### ***Allowing New Uses for Underutilized Data***

As noted above, in litigation or regulatory investigations, organizations are forced to identify, collect, review and produce disparate buckets of information from different sources in order to respond to plaintiffs' or a governmental entity's discovery requests. Often this is the first and only time all the subject information has been collected in one location. Through a little planning, and use of technology, the organization may be able to harness the power of this data and use it to identify strategic opportunities and generally make better business decisions.

Norton Rose Fulbright (NRF) has developed *NSight*, a collaborative information management and analysis platform, to assist clients with collecting, enriching, analyzing and manipulating private – as well as public – data sources. For example, as in many regulatory investigations, a life sciences manufacturer client was required to produce their payments to consulting physicians, sales data, and communications with prescribers.

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<sup>3</sup> *Global Data Protection Regulation Key Changes*, EUGDPR.org, available at <https://www.eugdpr.org/key-changes.html> (last visited April 6, 2018).

<sup>4</sup> *Anthem to Pay Record \$115M to Settle Lawsuits Over Data Breach*, NBCNews.com (June 23, 2017, 5:41 p.m. ET) <https://www.nbcnews.com/news/us-news/anthem-pay-record-115m-settle-lawsuits-over-data-breach-n776246> (last visited April 6, 2018).

<sup>5</sup> *Target Corporation 2016 Annual Report* at 44, available at [https://corporate.target.com/\\_media/TargetCorp/annualreports/2016/pdfs/Target-2016-Annual-Report.pdf](https://corporate.target.com/_media/TargetCorp/annualreports/2016/pdfs/Target-2016-Annual-Report.pdf) (last visited April 6, 2018).

<sup>6</sup> The Commission on the Theft of American Intellectual Property, *Update to the IP Commission Report, The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy, 2017* at 1, available at [http://www.ipcommission.org/report/IP\\_Commission\\_Report\\_Update\\_2017.pdf](http://www.ipcommission.org/report/IP_Commission_Report_Update_2017.pdf) (last visited April 6, 2018).

Using *NSight*, NRF collected the data from the client and also combined it with publicly-available Sunshine Act reporting data and Medicare payment data. The client was then able to use this data to produce documents in response to the regulatory request, but importantly, the client continues to add data to *NSight* and can use it in the future to spot possible compliance issues with payments to consulting physicians, to obtain a more complete picture of where company funds are being spent, and to look for trends and outliers in spending by the client or by prescribing physicians. The client will also be able to expeditiously and inexpensively respond to future regulatory requests.

### ***Reducing Costs by Eliminating Obsolete Data***

In the process of identifying and producing data in discovery, litigation counsel can often identify both paper and electronic data that may be obsolete, no longer requires retention and should be eliminated.

Paper Files: Counsel may identify irrelevant paper files that the organization is no longer required to retain. Elimination of obsolete papers can free up costly square footage and/or reduce storage fees. Also, by eliminating irrelevant files, the organization may be able to more easily locate important paper documents.

Electronic Data: While the cost of physically storing electronic data continues to fall, organizations can save significant resources by eliminating unnecessary electronically-stored data that the organization is not required to retained. The organization may eliminate costly licensing fees for software necessary to access certain data. The organization may also reduce the costs of complying with future discovery requests by reducing the total volume of data subject to possible discovery – which may cost up to \$18,000 a gigabyte to review<sup>7</sup> - and eliminating electronic data stored in formats that are costly to access and produce, such as backup tapes or data stored in obsolete software.

### **Litigation as an Opportunity to Engage New Talent**

Litigation can provide an excellent opportunity to engage talented new attorneys – such as junior attorneys or more diverse attorneys – to represent the organization. These attorneys can often provide creative ideas and insights to more effectively manage litigation. In fact, studies have shown that diverse legal teams are more than one and a half times as likely to achieve a “perfect ten” performance score and receive over three times higher Net Promoter Scores (Bain & Company client satisfaction index) than non-diverse

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<sup>7</sup> “The majority of Fortune 1000 corporations spend in the ballpark of \$5 million to \$10 million annually on eDiscovery, with several companies reporting costs as high as \$30 million in 2014. A full 70% of the costs were tied directly to the physical review of documents, according to a study from FTI Consulting. That boils down to about \$1.8 million per case, or about \$18,000 a gigabyte, which is about equal to a pickup truck full of data, according to a 2012 Rand study.” Jennifer Booton, *Don’t Send Another Email Until You Read This*, MarketWatch (March 9, 2015, 10:10 a.m. ET), <https://www.marketwatch.com/story/your-work-emails-are-now-worth-millions-of-dollarsto-lawyers-2015-03-06> (last visited April 6, 2018).

legal teams.<sup>8</sup> Engaging new talent also may ensure continuity in the handling of your legal matters, which can protect the organization in the future.

### **Toolkit**

While organizations may understand in theory the benefits that can be realized by spotting and correcting the “business” issues identified during litigation, it is sometimes difficult in practice, for a variety of reasons (ex. lack of time and resources, concerns about adversely affecting ongoing litigation, litigation fatigue, etc.), to engage a system to identify the issues and implement the changes. Some ideas for implementing a system to take full advantage of the possible opportunities presented by litigation include:

- Proactively advising outside counsel that you want to hear their thoughts/ideas/concerns – even if they do not directly impact the current litigation;
- Set feedback sessions at specific points in the litigation (after deposition preparation, after document production, after expert reports) where the litigation team identifies issues that potentially should be addressed;
- Request a “lessons learned” presentation from the litigation team after the close of litigation.

### **Conclusion**

There is ever-increasing pressure on in-house counsel to not only dramatically reduce litigation costs, but also to mitigate the risk and impact of litigation. Both in-house and outside counsel have access to information and opportunity to use advanced planning and continuous improvement to significantly reduce cost, improve efficiency and better align litigation processes with existing business processes and business exigencies.

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<sup>8</sup> Acritas Research Ltd, 2016 *Acritas Diversity Report* at 8, available at <http://www.acritas.com/system/files/Acritis%20Diversity%20Report%202016.pdf> (last visited April 6, 2018).