



## **DON'T PUT THE CART BEFORE THE HORSE: WHY ARE EARLY CASE ASSESSMENTS CRITICAL?**

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### **Don't Put the Cart Before the Horse: Why Are Early Case Assessments Critical?**

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## Big Picture: Why is This Important to You?



## Big Picture: Proof of Success

### ■ DuPont:

- ▣ Reduced costs by 28%

### ■ GE:

- ▣ Reduced costs from \$120.5 million to \$69.3 million in three years

### ■ Toro:

- ▣ 95% of claims have settled and the average settlement amount reduced from \$68,000 to \$20,000

## Big Picture: ECA Defined

“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.”

*23 Antitrust ABA 90 (Spring 2009)*

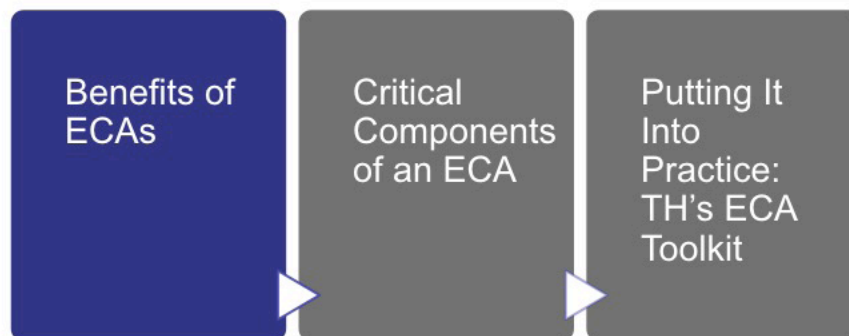
## Big Picture: Importance of an ECA

- Begin with the End in Mind
- Don't Go Into Battle Without A Written Plan
- 80/60 Rule
- Stay Ahead of the Opposing Party By Front Loading

## Roadmap: Where Are We Heading?



## Roadmap





## Benefits of Early Case Assessments

### ■ Pro-Active v. Reactive

- ▣ Leverage the Right Resources
- ▣ Avoid Cobbling Together Strategy Dictated by Opposing Counsel
- ▣ Think Like a Plaintiff's Attorney

## Benefits of Early Case Assessments

### ■ Reduce Costs

Table 4: Proportion of Litigation per Stage (Total Median Hours)

Litigation Task	Auto	Premises Liability	Real Property	Contract	Employment	Malpractice
Initiate	6%	8%	12%	10%	11%	8%
Discovery	21%	19%	22%	24%	21%	25%
Settlement	8%	9%	8%	7%	7%	6%
Pretrial	10%	14%	15%	14%	15%	11%
Trial	46%	41%	34%	39%	39%	42%
Post-disposition	8%	8%	9%	8%	7%	7%
<b>Total Attorney Hours (Median)</b>	<b>196</b>	<b>218</b>	<b>284</b>	<b>367</b>	<b>374</b>	<b>472</b>

## Benefits of Early Case Assessments

- 
- Reduce Risks
  - Confront Weaknesses
  - Drive Better Results
  - Measurable Outcomes

## Roadmap

Benefits of  
Early Case  
Assessments

Critical  
Components  
of an Early  
Case  
Assessment

Putting It Into  
Practice:  
TH's ECA  
Toolkit

## Five Critical Components


1. The Background of the Dispute
2. The Team
3. The Key Facts
4. The Legal Issues
5. The Playbook

## Critical Component #1: The Background of the Dispute

- Describe the Dispute
- Outline Nature of the Claims
- Describe Relationship of the Parties
- Discuss Any Ongoing Business Concerns
- Evaluate Judge and Opposing Counsel
- Identify Risks
- List Impending Deadlines




## **Critical Component #2: The Team**

- 
- Inside Counsel
  - Internal Business Team
  - Outside Counsel
  - Insurer




## **Critical Component #3: The Key Facts**

- 
- Identify Key Witnesses
  - Summarize Initial Interviews
  - Prepare Timeline of Events
  - Describe Key Documents
  - Identify any Knowledge Gaps




#### **Critical Component #4: The Legal Issues**

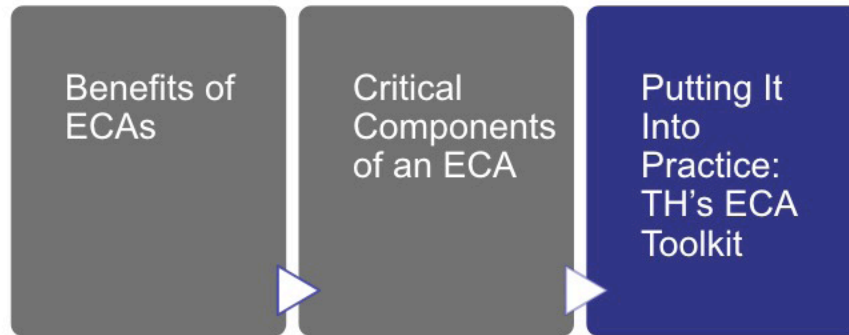
- 
- Determine Appropriate Procedural Issues
  - Summarize Substantive Legal Issues
  - Evaluate Damages
  - Identify Areas of Expert Testimony



#### **Critical Component #5: The Playbook**

- 
- Budget
  - Litigation Plan
  - Settlement Analysis

## Roadmap



## Putting It Into Practice: Thompson Hine's ECA Toolkit

- User-Friendly Interface
- Connectivity
- Flexibility
- Living Document
- Ubiquity

## Putting It Into Practice: ECA Checklist

**THOMPSON HINE**

**Early Case Assessment Checklist**

Client Discussion Points:	Done
1. What is a "success" for the Client? ○ Not the same as complete victory. May not even be what's in the pleadings (e.g., claim breach of contract, but really want to change relationship). Could be positive (e.g., recover this amount) or negative (e.g., avoid parallel federal investigations).	
2. What are the immediate client risks? ○ e.g., want to avoid disclosure of certain documents; critical witness is about to be transferred to an inconvenient place	
3. Who are the stakeholders at the Client? ○ In-house counsel, business unit(s), upper management, etc.	
4. What business unit/department is paying for the litigation at the Client? ○ Does the business unit's experience with/tolerance for litigation?	
5. What is that business unit's experience with/tolerance for litigation? ○ Does the business unit know what it's in for (time, resources, etc.)? ○ Does the business unit have a "fight to the death" policy? Will the business unit do everything possible – including taking a bad deal – to avoid going to trial?	
6. Is there insurance coverage? ○ we can review insurance policies and advise whether coverage would apply ○ insurance policies usually have very specific notice requirements, so it is important to confirm that they were followed (rather than getting a vague confirmation that the insurer was "notified")	
7. Is a litigation hold in place? ○ DM #11707002 v.3 – litigation hold notice for client/employees ○ DM #11707532 v.2 – template for letter to client explaining litigation hold	

## Putting It Into Practice: Model Documents

TEMPLATE FOR CLIENT'S LITIGATION HOLD NOTICE

Effective Date: \_\_\_\_\_

**Litigation Hold Notice**

**URGENT—PLEASE REVIEW THIS LEGAL HOLD NOTICE**

**DO NOT DESTROY ELECTRONIC INFORMATION OR PAPER RECORDS OF ANY KIND THAT MAY BE RELEVANT TO THIS MATTER**

Date: \_\_\_\_\_

To: \_\_\_\_\_

Regarding: [Relevant Departments/Personnel]

[Identify Matter]

We are currently involved in, or anticipate that we may become involved in, a regulatory, litigation, or other process that is likely to require us to review and produce information potentially relevant to the following issue(s) (hereafter Relevant Information):

[Summarize key issues, possibly including relevant file number, contract number, project name, individuals, companies, products or events, and/or time period or describe litigation, as appropriate]

Relevant Information includes information generated since [insert date if applicable or delete sentence if not applicable].

Applicable laws or rules may require us to preserve and produce the Relevant Information. **Any failure to comply could result in severe consequences to the organization.** To protect our interests and fulfill any obligations, therefore, we need to preserve all Relevant Information immediately.

## Putting It Into Practice: Template for Scoping Memorandum

**PERSONAL & CONFIDENTIAL**

Use this template to record the essential information about the project. Get agreement from the client on these elements. Distribute to the project team. (Please see last tab)

**Project Overview**

Name: (fill month and year) \_\_\_\_\_

**PROJECT NAME** \_\_\_\_\_

Project name \_\_\_\_\_

Prepared by: (participant name) \_\_\_\_\_

**PROJECT SUMMARY DESCRIPTION**

Summary of the project, project stage, or key milestones, including begin and end dates and work performed. \_\_\_\_\_

**SPONSORING BUSINESS UNIT**

<b>THOMPSON NINE TEAM</b>	<b>EXECUTIVE SPONSOR</b>	<b>(CLIENT) TEAM</b>
(Participant name) (Participant name) (Participant name)	(Participant name) (Participant name) (Participant name)	(Participant name) (Participant name) (Participant name)
(Role on Project) (Role on Project) (Role on Project)	(Role on Project) (Role on Project) (Role on Project)	(Role on Project) (Role on Project) (Role on Project)

**BUSINESS OBJECTIVE**

Describe the business objectives that are addressed by this project. What is the desired end state? What does success look like? \_\_\_\_\_

**PROJECT SCOPE**

Define the matter that must be completed to deliver the product or service. \_\_\_\_\_

**EXCLUSIONS FROM SCOPE**

List major activities that will not be undertaken. \_\_\_\_\_

**KEY ASSUMPTIONS**

What assumptions will affect scope if they are untrue or change? \_\_\_\_\_

**MAJOR RISKS TO TIMELY COMPLETION**

Risk \_\_\_\_\_

List of the major threats to the project achieving its goals. \_\_\_\_\_

Attachment  
Plan 7 (1/1)

## Putting It Into Practice: Thompson Hine's Budget Tool







## Takeaways

- ✓ 80/60 Rule
- ✓ Control the Process, Control the Result
- ✓ “No plan survives contact with the enemy”
- ✓ Demonstrate measurable value to clients and business people



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## Budgeting for Litigation: Obtaining Efficiencies and Meeting Client Goals

by *Brian Lamb and Tony Rospert*

"We must consult our means rather than our wishes," George Washington prudently observed. Although he was addressing wartime budgeting, his words resonate with today's corporate clients who are pressing their inside and outside litigation counsel to rein in litigation costs.

Since 2009 clients have increasingly sought to reduce litigation costs by asking outside law firms to cut their rates. But cutting rates alone is not a sustainable strategy to achieve long-term savings when managing complex or recurring business disputes. That's why some forwardthinking clients are requiring more from outside law firms to control costs and deliver more value.

So what can outside lawyers do to control costs and deliver more value to clients? There are many tools in the toolbox, including legal project management (LPM), process improvement, alternative fee arrangements/value billing and flexible staffing models. Thompson Hine embraces all of these in its approach to innovative service delivery. LPM tools and methodologies drive greater predictability and client communication, ultimately maximizing value to clients. Streamlined and standardized processes yield more efficiency and additional cost savings. Value pricing arrangements, as an alternative to the traditional billable hour, can meet a client's need to cap risk or achieve predictability. And flexible staffing models allow the law firm to use the right lawyer at the right price for each task in the litigation, thereby containing costs without sacrificing quality.

Consider one other useful but underutilized tool for delivering more value: a customized litigation budget. Of all the crucial documents a trial lawyer will create during the life of a complex dispute – such as a well-drafted complaint, a comprehensive motion for summary judgment or flawless jury instructions – a sound litigation budget is arguably one of the most important.

Outside counsel should view preparing a litigation budget not as a burden, but as an opportunity – an opportunity to collaborate with the client, to demonstrate a willingness to share risk, to minimize surprises and to maximize the chances bills will be paid without issue or delay.

Moreover, a sound legal budget enhances communication and transparency regarding the ongoing progress of the matter, a goal shared by the client and the trial lawyer.

### Litigation Budgeting: Thompson Hine's Standardized Approach

The challenge for a law firm is to build a culture that embraces budgeting as an opportunity, despite the uncertainties of litigation. At Thompson Hine, we have rallied around four key principles:

1. Standardize and simplify the budgeting process.
2. Give trial lawyers the right technology.
3. Take advantage of prior efforts and prior results.
4. Demonstrate commitment inside and outside the firm.

Using these principles, we have designed our own proprietary budgeting software that is available on every trial lawyer's computer. With this software, the trial lawyer can readily create a customized budget with sufficient detail to enable the client to make informed choices about scope, staffing and resources.

Our proprietary budgeting program is the product of collaboration among trial lawyers, IT specialists and our Director of Legal Project Management. Its user-friendly interface includes a series of prompts, drop-down menus and suggested possibilities drawn from the collective experience of our entire litigation group. Similar to a tax preparation program, the budgeting software asks questions and prompts the attorney to consider various aspects of the litigation planning process. It allows the lawyer to adjust standard budget elements for maximum customization of the budget, while still drawing on the collective wisdom of the firm's past engagements. And it automatically performs all calculations, eliminating the potential for errors due to incorrect (or deleted!) spreadsheet formulas or manual miscalculations.

At its heart, the budgeting software prompts the lawyer to plan the anticipated work on the matter by reference to the standard ABA litigation task codes plus a proprietary set of firmdeveloped sub-task codes. Using high/low ranges to bracket the expected spend for each timekeeper and task, the program accounts for some of the uncertainty inherent in budgeting long-term future events. The software also accounts for the element of time: The lawyer estimates the start and end date of each task (or phase), giving the client a good picture of the expected timing of its legal expenditures in future periods.

### Tracking Performance

After one creates a litigation budget, the job is only half complete. An important element of LPM is regular periodic reporting of actual billings versus budgeted billings throughout the life of the matter. Thompson Hine has invested in Budget Manager, a comprehensive software package that tracks budget-to-actual data. Whether the client requests it or not, our timekeepers code time entries for all matters; these

codes correspond to the budgeted task codes, enabling Budget Manager to track budget-to-actual data in real time. We then can create reports that contain detailed budget-versus-actual statistics by timekeeper, phase and task, and share them with the client. If the unexpected happens, we are in a position to promptly advise our client and discuss options.

### **Takeaways**

In light of escalating litigation costs and organizations'

shrinking budgets for legal services, corporate clients are challenging their law firms to offer new and innovative ways to achieve their goals more economically. As part of a comprehensive, disciplined approach to managing legal projects, trial lawyers and their clients should embrace litigation budgeting as a positive, concrete way to help control costs, improve efficiency and provide the transparency and accountability clients need to better manage their resources and expectations, ultimately increasing the value clients receive for their legal spend.

## FACULTY BIOGRAPHY

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As a partner in the Business Litigation group, Tony helps clients overcome legal obstacles in order to protect their assets and manage litigation risk in pursuit of their strategic goals.

He focuses his practice on complex business and corporate litigation involving financial service institutions, commercial and contract disputes, indemnification claims, shareholder actions, business transactions, class actions, regulatory enforcement, environmental litigation, toxic tort litigation, administrative appeals and tax controversies.

Tony has significant experience in complex litigation and the ADR process (mediations/arbitrations).

### **Related Services**

- Business Litigation
- Securities & Shareholder Litigation
- Environmental

### **Distinctions**

- Member of Crain's Cleveland Forty Under 40 Class 2013
- Listed as an Ohio Super Lawyers® Rising Star in Business Litigation, 2009, 2010 and 2013
- Outstanding Political Science Major, 2000

### **Publications**

- "Rise of Plaintiff Strike Suits in Public Company M&A Provides Cautionary Tale for Majority Holders of Close Corporations," SRR Journal, Spring 2015
- "Limiting Shareholder Suits In Mergers & Acquisitions: Potential Corporate Governance Solutions," The Deal, December 11, 2014
- "Budgeting for Litigation: Obtaining Efficiencies and Meeting Client Goals," Benchmark Litigation, November 13, 2014
- "Prepare to Settle: Develop a Pre-Mediation Framework for Complex Business Disputes," CMBA Bar Journal, November 2014
- "Curbs for Costly Discovery?: Federal Rules Reform Aim at Electronic Document Burdens," Washington Legal Foundation, June 2014
- "Pre-Closing Merger Disputes: Preventing Broken Deals by Navigating MAC Clauses," BNA's Corporate Law & Accountability Report, January 2014
- "The Closely Held Business: To Squeeze Or Not To Squeeze?" Law360, December 18, 2013
- "Beware of Boilerplate: Buyers Need To Consider the Unforeseen Hazards of Standard Indemnification Provisions," The Daily Deal & The Deal Pipeline, September 2012
- "Do You Want To Have A Successful Mediation? Selecting the Right Mediator," DRI's For The Defense, June 2012
- "A Real Alternative? Including an ADR Clause in Your Deal Documents," CMBA Bar Journal, July/August 2011

### **Education**

- Vermont Law School, J.D., magna cum laude, senior editorial board, business manager, Vermont Law Review
- John Carroll University, B.A., magna cum laude, Outstanding Political Science Major

