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# Achieving Optimal Evaluation of Business and Commercial Cases

By Louis Solomon

Perhaps one of the most important services an attorney can provide to a client is discerning the merits of a case and the likely outcomes during the course of litigation. But what is the best way to go about evaluating a case? And if, as experience has taught, there is no "best" way to evaluate a case, are there some really good ones that can be counted on to give the client sound advice over a broad range of potential types of cases?

First, it is important to know that case evaluation is neither a science nor really an art. Given the almost limitless known and unknown factors that shape the final litigation outcomes, perfection is almost impossible to achieve. The goal is to arrive at an "optimal" evaluation.

When done, well, optimally, an optimal case evaluation allows lawyer and client to use their collective judgment to identify and weigh the significance of the pivotal issues that a company or individual client faces in litigation:

- Whether the client should or should not prosecute or defend the action at all;
- What resources (counsel fees, management time, settlement dollars) should be devoted to the task;
- What strategies should be pursued both within and without the litigation;
- Whether and when to consider settlement; and
- What kind of costs can or should be imposed on the opposing party.

There is another benefit to careful case evaluation. In our modern litigious climate, senior managers and counsel must be ever-mindful of the prospect of a special investigator, internal investigator, the government or shareholders (in the form of class action or derivative suit) who will try to second-guess judgments that were made in litigating or not litigating, or settling or not settling. A rational and professional case evaluation process is a good means of reducing the exposure to liability in these circumstances.

The importance of case evaluation and planning early in the litigation process cannot be overstated. Cases are often won or lost by the pre-filing evaluation and planning, both from the offensive and defensive side. By the same token, cases change — often in profound and unexpected ways — as they proceed. Those changes must be assessed throughout the life of the case, requiring case evaluation to be a dynamic, interactive process. Without careful attention and engaged thought, cases either languish or go on for so long that they become unnecessarily expensive, with the client's objectives forgotten or, indeed, frustrated.

## The Relevant Cast of Characters

For civil cases of any complexity, case evaluation entails the timely and almost choreographed participation of three vital groups of actors: the client or non-legal personnel at the client; inhouse counsel; and outside counsel. Each has a vital role to play throughout the course of the evaluation process.

### *The Client*

The client's role is to provide a thorough understanding of its objectives. In addition, the client is typically in the best position to trace the history of the matter at hand and obtain the crucial information needed to pursue it. The client also must communicate the necessary tolerance for risk, which must be assessed throughout the process and, in the end, uses the evaluation to assist in making critical decisions.

### *In-House Counsel*

In-house counsel's role is to know the indirect or collateral costs that need to be considered when evaluating a case. They should also know the specific formats and frequency that the client wants to follow in receiving the case evaluations, as well as other relevant constituencies. In-house counsel also typically act as the interface between outside litigation counsel and the non-lawyers at the client by collecting the relevant documents, ensuring that documents are not discarded or destroyed once litigation becomes contemplated, and coordinating outside counsel's interviews with people possessing potentially relevant information.

### *Outside Counsel*

The role of outside counsel is also important in the case evaluation process. In most cases, it is outside counsel who create and update the case evaluation, make sure the legal issues and perspectives presented are thoroughly vetted and presented, and ensure that other relevant players — such as outside experts or consultants — offer their views and are accounted for. Outside counsel are also typically more familiar with the litigation process, jury pools and the court system, and other essential considerations in any evaluation. Also, outside counsel, typically being or including litigators, must serve as advocates for the client's position but also counselors who ensure that the client understands the implications of its behavior and decisions.

## Ascertaining and Helping Shape The Client's Objectives

The client's objectives play a critical role in how case evaluation should be approached. Litigation is not an end in itself; it should be pursued only if it is the best way to achieve the

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stated objectives. Given the substantial time and cost of litigation, objectives may change over time, or even be no longer operative at all. Knowing the client's objectives also helps to define the case evaluation process by determining its need and extent.

The process of designing a case evaluation protocol should include a means of identifying not just the client's strategic objectives, but also the particular details and tactics needed to achieve them. These will be different depending on whether the client is the plaintiff or defendant.

As a plaintiff, the client may want to recover money, seek an injunction against particular behavior, maintain the status quo, or establish a legal position that will apply in many other cases. As a defendant, the client may wish to reduce or eliminate its monetary exposure, send a message to other potential plaintiffs, or ensure that a plaintiff competitor internalizes the costs that it is trying to impose on the defendant.

## Rudiments of The Case Evaluation Process

Once objectives have been determined, there are a number of strategic and even broader considerations that should be taken into account at the beginning of the case evaluation process. They include:

- Does the client have the time, money, and other resources to conduct or defend protracted and extensive litigation?
- Does the expenditure of those resources make sense in relation to the amount realistically at stake?
- Does the client have an ongoing business relationship with the opposing party? Does it wish to preserve that relationship? Will the lawsuit jeopardize it?
- If the client is the plaintiff, will a judgment, if obtained, be collectible?
- Are there obvious counterclaims that might have a greater economic impact on the parties overall than the initial claim?
- If the client is the defendant, are there others out there similarly situated to the plaintiff who will be watching the results of the litigation with interest or perhaps influenced by it or by its outcome?
- Will prosecuting or defending the claim require the ongoing attention of key personnel whose time would be better devoted to the client's business?
- Is it important to fight, no matter the cost, to establish a reputation as a business that vindicates its position by not settling meritless cases? Will the client really feel the same way in a year or two when the litigation has cost staggering amounts of money and has distracted management?

***The case evaluation process includes determining strengths and weaknesses, risks and probabilities, and the upsides and downsides of the case.***

- Is there a legal principle worth vindicating that can affect the business? Is the particular case at hand an appropriate vehicle in which to seek vindication of that principle?

Simply stated, the case evaluation process includes determining strengths and weaknesses, risks and probabilities, and the upsides and downsides of the case. Once those issues have been addressed and the decision to move forward made, the process typically begins with litigation counsel presenting several different strategic and tactical approaches. At this stage, inside counsel can play a very useful role by probing and testing those recommendations on behalf of the client.

There are five basic steps in evaluating a case:

1. Identify the potential issues that will have to be resolved in order to conclude the litigation and to achieve the client's objectives (or to frustrate the other side's achievement of its own objectives).
2. Evaluate how the issues relate to one another and to the overall win/lose determination (typically imposed by the overarching legal principles governing the issues in the case).
3. Evaluate what risk or probability exists that any of the particular outcomes will be achieved. This is done by making assessments of the applicable facts and law, and requires knowledge and an estimation of what law will be applicable and what proof will be available in the case.
4. Evaluate possible upside and downside exposure in the case at hand. An important and sometimes dispositive element of early case evaluation is the question of damages.
5. Identify the indirect and collateral issues that must be taken into account from the client's perspective.

## The Tools of Case Evaluation

In order to achieve optimal case evaluation, one must have the tools that allow all parties to identify, review, and comprehend the significance of the sources of proof that will typically determine the trial and appeal. This process includes: a thorough search for and review of documents; client and witness interviews; third-party interviews; and a review of the universe of information available in the public domain.

Counsel's review and assessment of critical documents greatly influence the preliminary conclusions of the evaluation. This is also an excellent example of the importance of the partnership between outside and inside counsel, as the former generally knows the type of documents needed to review and the latter is most likely to know what is available and where to find it. In virtually any modern litigation, e-mail review is also a crucial part of this process — one that a client may often try to avoid or minimize, as it is time-consuming and costly. This is not a wise choice. More and more, e-mail has become the preferred means of communication in business and, in litigated cases, is the equivalent of a new state of matter — it resembles or embodies fleeting, evanescent thoughts yet bears the concreteness of a document. It is of monumental importance and cannot be ignored.

Likewise, a thorough review of information in the public domain is critically important. Today, with the explosion of the Internet and regulations requiring businesses to report various results in public forums, there is more information available from public sources than ever before. It will undoubtedly be thoroughly plumbed by the adversary, necessitating early inclusion in the evaluation process and frequent revisiting. It is also important to identify and interview potentially relevant witnesses early in the process, especially former employees. On countless occasions, these investigations have yielded new and unexpected information that otherwise would not have been known.

Another significant issue that must be addressed early in the process is what law the appellate court will apply once the findings have been made and any post-trial motions have been decided. An identification of the law likely to be applied must be done before any meaningful case evaluation can be conducted. Separate, but related, is the need to evaluate the damages or ultimate relief available to the client or to the other side.

Once a reasonable estimate of the sources and content of proof are made, and the law as well as the upside and downside risks are generally understood, an optimal case evaluation demands that myriad other practical issues and potentialities be taken into account. These include:

- Whether to be a plaintiff or defendant;
- Whether an opportunity or requirement to arbitrate or litigate exists;
- What type of action should be brought, including such issues as what type of action is the most likely to achieve the client's objectives;

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- Whether counterclaims could or should be asserted;
- What types of initial motions or, later in the case, post-discovery and pretrial motions, are cost effective given their likelihood of success;
- Venue;
- Choice of law;
- Whether the proof will be affected by the venue or choice of law;
- The judge, jury pool and circuit;
- What total costs, both direct and indirect, can be expected to be incurred;
- What other litigation, ongoing or possible, will impact the case at hand;
- What other collateral or unintended consequences may occur from the litigation or from any particular strategy chosen;
- Whether business considerations exist that impact the evaluation process;
- Whether other special or exogenous circumstances exist; and
- Whose case is easier to explain; and understand.

The next step in the case evaluation process is to make a careful, intelligent assessment of all these myriad and conflicting inputs. In each case, the parties will be doing their best to assess the likelihood that any given factor will be important, how important it will be, and what alternative outcome might occur if you are wrong about the existence of the factor, its likelihood (or risk) of occurring, or the potential upside or downside if it does or does not occur. Once all these considerations are identified, assessed, and evaluated, they must be compiled and communicated back to the client in a way that both captures the complexity of the case and also provides a means of assessing either the correctness of the evaluation or, at a minimum, the care and rationality of the process and approach.

## The Importance of Revisiting Case Evaluations

Litigation often takes years to resolve. Therefore, the strengths and weaknesses of the case, or the realistic upside and downsides, may differ considerably after significant events in a case occur. While there is no set of magical moments when cases should be evaluated and re-evaluated, at a minimum, careful stock should be taken at the following stages:

- Immediately after the suit is filed (or before if you are the plaintiff);
- When motions on the pleadings are being considered;
- Once early motion practice is completed;
- After document discovery is undertaken;
- After discovery, either after depositions are completed and summarized or when summary judgment motions are being contemplated or responded to;
- In the months leading up to the trial;
- During and after trial; and
- When an appeal is being contemplated or responded to.

Optimally done and timely updated case evaluations can — indeed, should — be used in making the critical decisions as the case proceeds. This is done by permitting the information and assessments in the evaluation to animate the consideration of strategy and tactics along the critical path of the litigation.